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80-1909

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE HEPPENSTALL COMPANY,
Petitioner,

v.

WILLIAM A. MURPHY, MARVIN PEASE, WILLIAM ROGERS, EDWARD BANACHOSKI, ALBERT BETTS, WILLIAM FAHERTY, ALBERT CHRISTMAN, ROMAN KRYSINSKI, CHARLES MANJEROVIC, WALTER REGAN, JOHN AUSTIN, JR., FRANK CONIGLIO, FRANK KUSH, LAWRENCE WIESEN, JOHN CHMILL AND SIDNEY ROBINSON,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 8, 1981

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QUESTIONS PRESENTED

Where individual employees sue their employer to enjoin breach of a pension agreement constituting part of a collective bargaining agreement and for damages, claiming federal jurisdiction under a federal statute pursuant to which a pension plan had been created as an entity subject to suit, and neither the plan nor its successor was made a defendant in the action,

IA. Can a federal court establish a "federal common law of pensions" to require an employer to provide a pension program which, in form and substance, is forbidden by the federal statute exclusively governing such programs, and at the same time rely on the federal statute to support the jurisdiction of the court over a common law action for pension benefits?

IB. Can participants in the plan recover full pension benefits directly from their employer based on a theory of general contract law in contravention of the statutory scheme to place sole liability for benefits on the plan and its successor and without complying with the grievance procedure and arbitration clause of the collective bargaining labor agreement?

II. Can participants in the plan recover pension benefits directly from their employer without complying with the aribitration clause of the collectively-bargained pension agreement?

III. Can participants in the plan recover pension benefits directly from their employer without joining as a party to the action the successor and insurer of the plan, which becomes solely liable to them for pension benefits and which is entitled to partial reimbursement from the employer?

SUPREME COURT RULE 28.1
AS AMENDED OCTOBER 21, 1980

Parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of The Heppenstall Company, a Pennsylvania corporation:

The following corporations, nominees and stock brokers are registered owners of voting stock of The Heppenstall Company:

Alan Wood Steel Company
Bucher & Co.
Butcher & Singer, Inc.
CEDE & Co.
Elm & Company
Glover & MacGregor, Inc.
H.C.S. Corporation
H.C.S. Foundation
Harold Schott Foundation
Hefren & Co.
Hugo Neu Corp.
F. K. Kerper & Co. Pension Plan
Lewco Securities Corp.
Park Corporation
Parker Hunter Incorporated
Sycamore Pharmacy
Tweedy, Browne & Knapp
United Societies of Greek Catholic Religion of U.S.A.

The Park Corporation, of South Charleston, West Virginia, a substantial owner of Hepppenstall's voting stock, has two partially owned subsidiaries, Bridalveil Lumber Co. and Ampac Forest Products Co., both of Portland, Oregon.

Prior to December 12, 1978, Alpha Sierra Corporation, an affiliate of Tishkin Products, Inc., was a substan-

tial owner of Heppenstall's voting stock, and prior to March 5, 1979, Blue Diamond Coal Company was a substantial owner of such stock.

Petitioner has no knowledge of any corporate beneficial owner not included in the above list, except that it has been informed that Old Republic Insurance Company, a partially owned (99.7%) subsidiary of Old Republic International Corp., is the beneficial owner of shares registered in the name of CEDE & Co.

PARTIES TO PROCEEDING IN COURT OF APPEALS

In addition to the parties named in the caption of the case in this Court, the Pension Benefit Guaranty Corporation, a federal body corporate, filed a brief as amicus curiae in the Court of Appeals at the request of that court.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, The Heppenstall Company, a Pennsylvania corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 10, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit filed December 10, 1980 affirming the District Court is set forth in Appendix A hereto, page 1a.

The opinion of the United States District Court for the Western District of Pennsylvania (Dumbauld, D.J.) filed August 8, 1979 denying defendant's motion to dismiss the complaint or, in the alternative, to refer the issue to arbitration, reported in 473 F.Supp. 783, is set forth in Appendix B hereto, page 14a.

No opinions were filed relating to the District Court's order entered April 1, 1980 denying defendant's motion for reconsideration and to dismiss and granting plaintiffs' motion for partial summary judgment (set forth in Appendix C hereto, page 19a), and his order entered April 23, 1980 supplementing the orders of August 8, 1979 and April 1, 1980 to permit interlocutory appeals (set forth in Appendix D hereto, page 22a), except to the extent that the orders themselves contain the opinions of the district judge.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit sought to be reviewed (24a) was dated and entered December 10, 1980. The order of the Court of Appeals denying the petition for rehearing (filed December 23, 1980) (26a) was dated and entered January 9, 1981. By an order of Mr. Justice Brennan dated March 24, 1981, the time for filing a petition for certiorari was extended to and including May 8, 1981.

Jurisdiction to review the judgment of the Court of Appeals is conferred on the Supreme Court by the Act of Congress of June 25, 1948, c.646 (62 Stat. 869), section 1254(1) (28 U.S.C. §1254(1)).

STATUTES INVOLVED

The case involves the Employee Retirement Income Security Act of September 2, 1974, Pub. L. 93-406 (88 Stat. 832) as amended (29 U.S.C. 1001 ff.), commonly called ERISA, and parts of sections 401, 411, 412 and 501 of the Internal Revenue Code of August 16, 1954 (68A Stat. 5), referred to as the Code, as amended by ERISA (26 U.S.C. §§401, 411, 412, 501). The sections of those statutes which are involved in the present action are listed in the contents of the appendix (pp.i-iii) and are set out verbatim in appendices G (pp. 28a-49a) and H (pp.50a-52a). Section 412 appears at page 43a.

STATEMENT OF THE CASE

Plaintiffs, retired hourly-paid employees of petitioner, defendant-appellant below, The Heppenstall Company, at its Pittsburgh plant, which had ceased operations on May 31, 1979, filed a civil action on June 13, 1979 in the District Court for the Western District of Pennsylvania against defendant company under ERISA, seeking in count I an order enjoining defendant from failing to pay them pension benefits in accordance with the pension agreement made in September 1977, but effective August 16, 1976, which was part of the collective bargaining labor agreement between the company and the United Steelworkers of America, and for damages suffered by plaintiffs for such alleged breach. Count II, which was not pressed below, requested an order enjoining defendant from failing to make contributions to the plan.

Jurisdiction of the district court was invoked under section 502(e) of ERISA (29 U.S.C . 1132(e))(39a). Defendant moved to dismiss for lack of subject matter jurisdiction or in the alternative to stay the proceedings pending arbitration under the arbitration clauses of the pension agreement and of the collective bargaining agreement. On August 8, 1979 the District Court (Dumbauld, D.J.) denied (18a) defendant's motion to dismiss or for arbitration, stating that plaintiffs' action was a suit on "defendant's contractual agreement, in what would have been an action of *indebitatus assumpsit* at common law." (473 F.Supp. 783, 786)(14a at 17a).

On August 31, 1979 defendant moved the district court for reconsideration, on the ground that the same district judge had entered an order in a cognate case on June 28, 1979 terminating the pension plan as of that

date,[1] thus holding that the pension agreement created a pension plan subject to all the provisions of ERISA. In the alternative, defendant moved for a stay pending the determination of an appeal from that order. As an additional ground for reconsideration defendant asserted that plaintiffs themselves had recently demanded arbitration of their claims pursuant to the pension agreement and pursuant to the collective bargaining agreement, under its grievance procedure.

On November 2, 1979 plaintiffs filed a motion for summary judgment in the present action,[2] and on January 17, 1980 defendant filed a motion to dismiss the amended complaint for failure to join an indispensable party, for failure to state a claim upon which relief could be granted, and on the ground that plaintiffs' claims had been fully litigated in the cognate case. In the alternative, defendant asked leave to file an answer to the amended complaint and to file a third-party complaint against the plan, the plan's trustee and/or against the Pension Benefit Guaranty Corporation (PBGC).

On April 1, 1980 the District Court denied defendant's motion for reconsideration and to dismiss and granted plaintiffs' motion for summary judgment, which he characterized as a partial summary judgment, and entered judgment "against the defendant for such sums as each plaintiff individually is entitled to pursuant to the terms of the applicable contracts providing for pension benefits;" (20a). Defendant duly appealed, both as of right and under 28 U.S.C. §1292(b).

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1. As the result of the order of the Court of Appeals in the cognate case, *Pension Benefit Guaranty Corp. v. Heppenstall Co.*, 633 F.2d 293 (3d Cir. 1980), the termination date was, after remand, changed to May 31, 1979. Pension Benefit Guaranty Corp. has taken an appeal.

2. Plaintiffs also moved to amend the complaint for leave to file as a class action, but later withdrew that motion.

The Court of Appeals for the Third Circuit, pursuant to an opinion by Circuit Judge Gibbons, joined by Circuit Judge Rosenn and District Judge Hannum, on December 10, 1980 affirmed the District Court (1a,24a) and appellant's timely petition for rehearing was denied on January 9, 1981 (26a). This Petition for Writ of Certiorari was filed on May 8, 1981.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Plaintiffs invoked the jurisdiction of the United States District Court for the Western District of Pennsylvania pursuant to section 502(a) of ERISA (29 U.S.C. §1132(a))(3a), set forth in Appendix G hereto at page 39a. Plaintiffs are all citizens of the Commonwealth of Pennsylvania residing in Allegheny County, and defendant is a Pennsylvania corporation with its principal place of business in Allegheny County. Allegheny County is in the Western District of Pennsylvania.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Third Circuit has rendered a decision in conflict with decisions of the Supreme Court of the United States and with decisions of the Courts of Appeals for the Sixth, Seventh, Eighth and Ninth Circuits on the same matters, as will be pointed out below.

The Court of Appeals for the Third Circuit has decided a number of important questions relating to the construction of a federal statute (ERISA) which have not been, but should be, settled by your Honorable Court, because the issues presented with respect to petitioner's pension plan involve the fundmental precepts of ERISA and will affect a vast number of pension plans in use in

industry throughout the entire country, and such questions will certainly arise in future litigation[3]. A decision on the fundamental issues raised by the present petition will be of great use, providing guidance and reducing or eliminating the necessity for litigation. The most important of those questions, as to which petitioner believes the courts below fell into error, will be discussed in petitioner's argument which follows.

The decision below, imposing on employers large unforeseen additional liabilities for unfunded pensions, if permitted to stand will seriously, if not disastrously, affect the financial stability of many American corporations, large and small. The universal belief in the financial world, as shown by commentators,[4] is that an employer's maximum liability for unfunded pension benefits is 30 percent of its net worth. The decision below would remove all limits from employers' liability by establishing pension programs that are outside ERISA, in direct derogation of the will of Congress.

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3. Additional litigation is certain because of the "almost incomprehensible vagueness" of the statutory provisions relating to the role of participant employees in involuntary termination proceedings: *Pension Benefit Guaranty Corp. v. Heppenstall Co.*, supra (p. 4, fn. 1), 633 F.2d 293 at p. 302.

4. E.g., Scott, in Pensions & Investments, July 21, 1980 (Crain Communications, Inc., Chicago).

ARGUMENT

I. PARTICIPANTS IN A PENSION PLAN HAVE NO RIGHT OF ACTION TO RECOVER BENEFITS DIRECTLY FROM THEIR FORMER EMPLOYER

A. *ERISA applies exclusively to all acts by employers engaged in or affecting interstate commerce which provide for the payment of a pension or other form of deferred compensation to a group of employees upon or after termination of their employment*

By definition,[5] "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program —(A) provides retirement income to employees, or (B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond," is subject to ERISA. That statute is applicable to any such "pension plan" established or maintained by any employer engaged in interstate commerce or in any industry or activity affecting interstate commerce.[6]

Although various succeeding parts of the statute either exclude in toto certain types of program which would fall within the broad statutory definition, as well as programs maintained by certain classes of employer,[7] or exclude other specified types of program from the operation of specific sections,[8] none of these exceptions or any other exception is applicable to the pension pro-

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5. ERISA section 3, subsection (2), 29 U.S.C. §1002(2)(30a).

6. Sections 4(a)(32a) and 3, subsection 11(30a), 29 U.S.C. §1003(a) and §1002(11)(33a).

7. Section 4(b), 29 U.S.C. §1003(b)(33a).

8. Sections 201 and 301, 29 U.S.C. §1051, 1081(33a,35a).

gram established by or maintained under the agreement which forms the foundation of the present action. Therefore that agreement, and any program functioning under or by reason of it for providing pension benefits, is a pension plan governed by all sections of ERISA, including those amending the Internal Revenue Code.[9]

Thus Congress intended ERISA to be a comprehensive and all-embracing statute governing all private pension programs[10] except those specifically excluded, making it the exclusive statute applicable to such programs and pre-empting all control of this subject by the states.[11] Both the District Court and the Court of Appeals attempted to bifurcate the pension agreement and its concomitant retirement program so that the program was both covered by ERISA and not covered by ERISA, and yet the two courts found ERISA applicable to the employee's rights in both instances. In so doing those courts have nullified the basic tenets of ERISA. This fundamental misconception of the effect of ERISA is responsible for the ensuing errors of the courts below.

B. *Petitioner's pension plan is governed by ERISA*

Section 1016 of ERISA amended Code section 401 to provide that an employer's pension plan would qualify for favorable tax treatment under the Code only if it conformed to and complied with the requirements of the Code as amended by ERISA.[12] Any pension plan established or maintained by an employer engaged in interstate commerce which qualifies under the Code as amended is therefore governed by ERISA unless specifically excluded.

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9. Sections 1011-1017, 1021-1023, 1031-1034, 1041, 1051-1054(42a-43a).

10. Section 2, 29 U.S.C. §1001(30a).

11. Section 514, 29 U.S.C. §1144(41a).

12. Code section 401(a), 26 U.S.C. §401(50a).

The pension agreement portion of the collective bargaining agreement effective August 16, 1976 between plaintiffs' union and petitioner obligated petitioner to provide pension benefits for its employees, but only on condition that the trust from which the pension benefits were to be paid would be "exempt under the applicable provisions of the Internal Revenue Code." (section 1.3,75a). The pension agreement therefore required petitioner to provide pension benefits for its employees, but only pursuant to a pension plan which would qualify under the Code and be governed by ERISA.

The pension agreement, constituting the pension plan involved here, would not, in the form in which was first agreed to (75a), have complied with the Code as amended by ERISA, and thus the trust would not have been exempt under the Code. The parties therefore amended the pension agreement (76a) so that the trust under the plan complied with the Code's requirements for exemption, and the plan remained qualified.[13] As part of the amendment required by the Internal Revenue Service (I.R.S.), section 10.2 of the agreement was supplemented by a provision which stated that if the plan established by the agreement were terminated, the participants' rights in the pension benefits would become fully vested and nonforfeitable, to the extent those benefits were funded (76a).

ERISA empowers PBGC, the statutory guarantor of the trust fund created by the plan, to terminate pension plans.[14] On December 18, 1978 PBGC filed an action[15] to

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13. This amendment brought the plan into compliance with Code section 411(d)(3) as added by ERISA (26 U.S.C. §411(d)(3))(51a).

14. ERISA section 4042, 29 U.S.C. §1342(46a). Were it not for this statutory provision, petitioner's pension plan could not have been terminated until after the pension agreement's expiration date, December 31, 1979 (Pension Agreement §10.12): *International Union, Etc. v. White Motor Corp.*, 505 F.2d 1193 (8th Cir. 1974).

15. The cognate action referred to above (p. 4, fn. 1).

terminate the pension plan created by the pension agreement, and on June 28, 1979 the court ordered its termination. (pp. 3-4, and fn. 1). Having done this, the District Court held on August 8, 1979 that under the terms of the same pension agreement plaintiff participants were contractually entitled to benefits and that they could fully recover them from petitioner, their former employer, without resorting to the plan, the assets in the plan or PBGC. The Court of Appeals reached the same result, but based their opinion on a federal common law of pensions.

The District Court found petitioner directly liable to its former employees from the language of section 1.3 of the pension agreement (75a), in which petitioner had agreed to provide the pension benefits set forth in the agreement. In so doing, the Court ignored the condition (imposed in the very same sentence) that petitioner was obligated to provide such benefits only if the trust[16] under the pension plan was exempt under the Code, and ignored the fact that the trust had been amended to comply with the Code and that the amendment limited the participants' rights to benefits which had been funded.

The District Court brushed aside the amendment which the IRS had required in order to fulfil the condition precedent for qualification of the plan, saying that it had "no application to plaintiffs whose pension rights

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16. The District Court held that petitioner's contractual obligations to plaintiffs constituted a pension plan (19a), but totally disregarded the statutory mandate of section 403(a) (29 U.S.C. 1103) (38a), requiring that all pension plan assets must be held in trust. Thus according to the logic of the District Court, an employer's entire assets are trust assets for the benefit of plan participants, due to the employer's direct liability for payment of benefits. The Court of Appeals avoided the requirement of section 403(a) by holding plaintiff's claims to be federal common law contract claims against their employer and not claims for benefits under a "pension plan" (8a).

had previously been consummated upon actual retirement." (17a). This would destroy the plan's qualification under the Code, something the Court had no right to do. It also constituted an improper amendment of the agreement by judicial fiat, because the document nowhere contains any such limiting or exclusionary language. The pension agreement states that in the event "this Agreement"—meaning the pension plan created by the agreement—"is terminated in whole or in part,[17] the rights of any participant with respect to whom such termination shall have occurred shall . . . be fully vested and nonforfeitable . . . to the extent those benefits are funded by the applicable assets of the trust fund."(76a) This plainly included all participants as to whom the plan was terminated. The agreement contains no language whatever limiting it to participants who had actually retired or otherwise terminated their employment with vested or nonforfeitable rights; nothing else in the record supports any such limitation; and ERISA does not set up any classification of employees, some with and some without a direct right of action against their employer.

The District Court also disregarded the language of the statute on which he relied for federal jurisdiction. Section 502, subsection (a)(1)(B) of ERISA (29 U.S.C. §1132(a)(1)(B)) permits a participant[18] to bring a civil action "to recover benefits due him under the terms of his plan . . ."(39a). Subsection (d)(1) states that "An employee benefit plan[19] may . . . be sued under this subchapter as an entity,"(40a) and, in subparagraph (2), states that "Any money judgment under this subchapter

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17. Partial termination would occur, for example, when an employer closed one of the several plants covered by a pension agreement.

18. Defined in section 3(7), 29 U.S.C. §1002(7)(30a).

19. Defined in section 3(3), 29 U.S.C. §1002(3)(30a).

against an employee benefit plan shall be enforceable only against the plan as an entity and not against any other person..." (with an exception not here involved)(40a). These provisions show that the right of action given a participant by section 502 was intended to be limited to an action against the plan, and that the person having such right of action, the participant, was someone eligible to receive a benefit from an employee benefit plan. Nowhere does ERISA establish a private contract right of action for benefits against an employer.

C. *An employee cannot recover pension benefits directly from his employer*

All employee pension plans subject to ERISA, unless exempted, are required to be funded,[20] and all pension plans qualified under the Internal Revenue Code must be funded.[21] An unfunded plan, known as a pay-as-you-go plan, would not qualify for treasury approval either before or after ERISA. Congress intended ERISA to outlaw such plans,[22] and section 3(31) did so. (29 U.S.C. §1002(31))(32a).

The contract provisions of section 1.3 of the pension agreement in suit, when construed as not being conditioned on obtaining I.R.S. approval, would not (in this case) provide pension rights which are funded. Thus the contract would not be subject to ERISA. On the contrary, it would be prohibited by ERISA. The District Court apparently realized this when he decided that plaintiffs were suing on defendant's contractual agreement, in

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20. ERISA sections 301(a) and 302, 29 U.S.C. §§1081(a) and 1082 (35a,36a).

21. Code section 412 (43a), 26 U.S.C. §412, and I.R.S. Pub. 778 (2-72) part 2(b)(53a); Rev.Rul. 71-91, 1971-1 C.B. 116(52a).

22. S. report No. 93-127 to accompany S.4 (58a, 59a). "It is within the contemplation of the Committee that so-called 'pay-as-you-go' or 'terminal funded' plans are precluded under the requirements of this section." (59a).

what would have been an action of *indebitatus assumpsit* at common law—i.e., that the suit was not based on petitioner's pension plan at all. Yet he had held (on June 28, 1979) in the cognate case (pp. 3-4 and fn. 1, supra) that the pension plan provided for in the agreement was subject to ERISA, because only by reason of ERISA was PBGC empowered to terminate qualified pension plans and obligated to insure pension benefits.

The District Court thus held in the case at bar that the pension agreement in suit created and imposed on petitioner two obligations: (1) to provide a plan for pension benefits under ERISA, and (2) to provide exactly the same pension benefits outside ERISA. The Court found the basis for these two different obligations in a single provision of the pension agreement, section 1.3, by saying that the pension agreement nowhere limited the benefits for which defendant was liable to those derivable from the assets of the trust fund (16a-17a). In so doing the Court erroneously disregarded the additional language of section 10.2 on the ground that such language had been required by the I.R.S. merely for qualification and did not affect the contract claim.

The Court of Appeals took a similar approach. Judge Gibbons found a limitation to petitioner's funding obligation in the amendatory language which the I.R.S had required to be added to section 10.2 of the pension agreement, saying that the obligation to fund "in accordance . . . with the provisions of Section 8 of this Agreement" (76a) excused any and all funding whatever because the language of section 8 was permissive only and "does not oblige the employer to fund any trust" (5a). Judge Gibbons completely ignored the entire purport of ERISA and the express requirement of section 412 of the Code (26 U.S.C. §412)(43a) imposing minimum funding standards on all qualified pension plans.

In attempted answer to petitioner's contention that its liability on termination of an insufficiently funded pension plan was limited to 30 percent of its net worth payable to PBGC pursuant to section 4062 of ERISA (29 U.S.C. §§1362)(48a), Judge Gibbons said that that section did not "address pension benefits directly recoverable from the employer"(9a). This was correct, because under ERISA such an obligation creates a "pension plan," and under ERISA no pension benefits can be directly recoverable from the employer; they can be recovered only from "pension plans" (which must be funded).[23]

In support of his opinion Judge Gibbons cited the decisions of two federal district courts, *In re Alan Wood Steel Co.*, 212 BNA Pension Reporter D-1 (E.D.Pa. 1978), and *In the Matter of M & M Transportation Company*, 288 BNA Bankruptcy Reporter D-4 (S.D.N.Y. 1980)(10a). The first of those cases is not in point because the two plans there involved were not terminated and the employer, having created a fund available to all its unsecured creditors, did not care how it was divided among them. It therefore did not contest the claims of the hourly-paid employees against that fund.

In the M & M case Bankruptcy Judge Babbitt held that the employees were not entitled to recover from the debtor's assets, but on appeal District Judge Werker, although apparently agreeing that Judge Babbitt's decision comported with congressional intent, nevertheless reversed on the ground that Congress could not have intended that an employer with net assets was not subject to a liability to its employees, in addition to its 30 percent liability to PBGC.

The committee reports and statements of the legislators in support of the bills which resulted in the

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23. Footnote 5, supra. p. 7.

enactment of ERISA[24] make it abundantly clear that Congress *did* intend to limit the liability of employers in exactly the manner urged by M&M Transportation Company and found by Bankruptcy Judge Babbit. Prior to ERISA, employers usually limited their liability on termination of their pension plans. In the early drafts of ERISA Congress imposed 100 percent liability on the employers to reimburse PBGC (57a). Because this was felt to be too severe, the 100 percent reimbursement requirement was reduced in later drafts, first to 50 percent (60a,62a,67a), and finally to 30 percent (64a,65a, 69a), where it remains as section 4062 of ERISA (29 U.S.C. §1362)(69a,48a). Congress correspondingly reduced the benefits which PBGC was obligated to pay to participants in terminated plans.

Thus Congress intended to limit employers' liability, not only to PBGC, but also to any other pension benefit claimant. This is proved by the statements to that effect in House Report No. 93-533.[25]

Except for Judge Werker's decision in the M&M case, supra (p. 14) (and Judge Dumbauld's decision in the case at bar), all the district courts which have addressed the question of whether an employer is directly liable to his employees for benefits under ERISA have answered squarely in the negative.[26] In holding to the contrary, Judge Werker (and Judge Dumbauld and the Court of Appeals for the Third Circuit) fell into the error of im-

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24. Appendix I, pp. 55a-70a.

25. Appendix I, pp. 65a-67a.

26. *Lazur v. United Mine Wkrs. of America*, 471 F.Supp. 114 (D.D.C. 1979); *Nefferdorf v. American Chain & Cable Co.*, No. 78 M-0822 (ND.Ala. 1979); *King v. Allis-Chalmers Corp.*, No. 77-883 (W.D.Pa. 1979); *Barrett v. Thorofare Markets, Inc.*, 452 F.Supp. 880 (W.D.Pa. 1978); *Carter v. Montgomery Ward & Co.*, 76 F.R.D. 565, 568 (E.D.Tenn. 1977).

posing liability for pension benefits on an entity other than a "pension plan."

To carry out the underlying purpose of ERISA—ensuring the security of workers' pensions (28a)—provision was made for insurance in the event a plan is terminated without sufficient assets to pay the promised benefits.[27] This was accomplished by the creation of PBGC, which insures, upon termination of a qualified defined benefit pension plan, all nonforfeitable pension rights (other than those becoming nonforfeitable by reason of the plan's termination) up to a maximum amount specified in the statute, and has a limited claim against the employer.[28] The insurance obligation becomes operative upon termination of the plan.[29] PBGC becomes liable for the present value of the benefits to be paid to the participants to the extent the assets of the plan are insufficient, for which PBGC has the right to be reimbursed from the employer's assets, up to 30 percent of the employer's net worth.[30]

The District Court in the case at bar held that whatever recovery plaintiffs obtained from defendant would be diminished by such amounts, if any, as might be paid by PBGC (14a). Neither the statute nor the pension agreement in suit provides for this—another indication that direct liability of defendant to plaintiffs was not intended.

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27. Title IV, sections 4001-4082, applicable parts, 29 U.S.C. §§1301-1381, 26 U.S.C. §401 (43a-49a,50a).

28. ERISA sections 4002, 4022, 4062, 29 U.S.C. §1302, 1322, 1362 (44a,46a,48a).

29. Section 4022, 29 U.S.C. §1322 (46a).

30. Section 4062(b)(2), 29 U.S.C. §1362(b)(2)(48a-49a).

The Court of Appeals (11a) based direct liability of an employer to its former employees on language in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 385 (1980). In that case Nachman Corp. had, prior to the enactment of ERISA, established a pension plan which expressly disclaimed direct liability to employees for any funding deficiency of the plan.

The Court of Appeals in the present case reasoned that the employer's obligation to reimburse PBGC in an amount up to 30 percent of the employer's net worth "demonstrated Congress' intention to preserve employers' 'right to place a contractual limit on their direct liability to their employees.'" (12a). The Court of Appeals concluded that if the employer could limit direct liability, direct liability must persist in the absence of limitation (13a).

The Court of Appeals misunderstood the *Nachman* opinion, overlooking the fact that the pension agreement in that case was entered into before ERISA was enacted and that the Nachman plan was terminated before many of the provisions of ERISA, including the funding requirements, became effective. Nachman Corp. naturally wished to limit its direct liability under state laws, which were applicable to pension contracts prior to ERISA: *Malone v. White Motor Corp.*, 435 U.S. 497 (1978)[31]. Nachman Corp. expressly did so under state law when it established a funded pension plan and limited its pension obligation to the amounts it contributed prior to termination of the plan, thereby disclaiming any direct liability to participants in the plan.

The plan of Heppenstall Company, petitioner at bar, was agreed to in final form after ERISA became effective. There was therefore no need to disclaim direct lia-

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31. All state laws pertaining directly or indirectly to pension plans have been preempted by ERISA: section 514 (29 U.S.C.§1144)(41a).

bility for benefits, because ERISA itself, being all-inclusive and not providing for direct liability, precluded it. ERISA established "pension plans" as the only entities liable for pension benefits.

This conclusion is confirmed by the Supreme Court's analysis of the employer's liability in the *Nachman* case. Mr. Justice Stevens points out that the 30 percent limitation on the employer's obligation to reimburse PBGC (section 4062(b)(2), 29 U.S.C. §1362(b)(2))(48a) "plainly contemplates the situation in which the employer has disclaimed direct liability; for if the employer were directly liable to the employees for the full amount of any funding deficiency, the 30% limitation would serve no useful purpose." (446 U.S. at p. 380). This reasoning, applicable to a plan created prior to the enactment of ERISA in which the employer has expressly disclaimed direct liability, applies with equal force to a post-ERISA plan where ERISA itself has barred the employer's direct liability to employees, taking the place of the express disclaimer made by Nachman Corp. If ERISA permitted direct liability to employees to the extent of funding deficiencies, "the 30% limitation would serve no useful purpose."

The 30% limit performs a useful function. It imposes a compromise, or partial, obligation on the employer for deficiencies in the assets of the plan, so that the employer, instead of being able to disclaim all liability for shortages in the plan's assets, remains liable for part of them. The employer's liability is to PBGC, which in turn is liable to the participants, though in most cases in a larger amount. Thus when the assets of a plan are insufficient to pay the participants' nonforfeitable benefits in full, and the shortage exceeds 30% of the employer's net worth, the Act has divided the loss among the employer (up to 30% of its net worth), PBGC (for an additional amount above its 30% claim), and the participants (to the

extent their nonforfeitable rights are not paid in full). Congress having thus allocated the loss, the courts should not try to rearrange it. In so doing, the District Court and the Court of Appeals fell into error.

The creation of a common law right of action in the employees apart from and outside ERISA, permitting them to disregard the pension plan and recover pension benefits directly from their employer, constituted the principal error of both courts below. The federal courts derive their jurisdiction only from federal statutes. The fact that a federal statute does not expressly forbid the creation of a common law right does not constitute the necessary affirmative provision conferring that power on such courts. In civil matters between private citizens a federal common law arises only from, and only in relation to, some federal statute *(Sola Electric Co. v. Jefferson Co.*, 317 U.S. 173 (1942)). Since ERISA provided no such right, it follows that Heppenstall's employees had no direct right of action against their employer for pension benefits under a federal common law.

D. *If employees have a claim directly against their employer for pension benefits, the collective bargaining agreement between their union and petitioner requires the dispute to be settled by arbitration*

The only federal common law right plaintiffs could possibly have would therefore be a right tied to some federal statute. Other than ERISA, the only federal statute available to them is the National Labor Relations Act of July 5, 1935, c.372 (49 Stat. 449) as amended by the Labor Management Relations Act of June 23, 1947, c.120 (71 Stat. 136, 29 U.S.C. §151 ff.).

As the District Court stated (15a,fn.1), the pension agreement in suit was a collectively bargained labor agreement. It was part of the overall collective bargain-

ing labor-management agreement dated August 25, 1975[32] (71a) and was therefore subject to the arbitration clause of that agreement. That agreement defined a grievance as a dispute over any claim or obligation covered by the agreement and specified that the parties intend to "set forth their agreement on rates of pay, hours of work and other conditions of employment."(71a) The "other conditions of employment" include retirement and pension plans: *Inland Steel Co. v. National Labor Relations Board*, 170 F.2d 247 (7th Cir. 1948), cert. den. as to pension issue 336 U.S. 960 (see 339 U.S. 382 at pp. 384, 386-7).

An arbitration clause in a collective bargaining agreement requires arbitration of a controversy over severance pay or pension benefits claimed by former employees: *Republic Steel v. Maddox*, 379 U.S. 650 (1965); *Local 589, Intern. Ladies Garment v. Kelwood Co.*, 592 F.2d 1008 (8th Cir. 1979); *United Steelwkrs. of Amer. v. General Steel Indus. Inc.*, 499 F.2d 215 (8th Cir.1974). Plaintiffs therefore have no direct right of action against their former employer. They must follow the applicable procedure for resolving grievances.

Judge Gibbons agreed that federal common law can be derived only from a federal statute, saying that the employees' contract claim against the employer was not only under the federal common law of pension plans, but also under the federal common law of labor-management contracts (8a). In holding that plaintiffs were entitled to recover in a direct action against their employer, Judge Gibbons completely overlooked the grievance and arbitration provisions of the labor-management agreement

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32. Attached to that overall labor agreement is a "Memorandum of Understanding re: Pensions," providing for changes in the pension benefits.(73a)

between plaintiffs and petitioner, the overall collective bargaining agreement dated August 25, 1975 (71a, 72a). In failing to enforce them, he violated the universal policy of the courts to enforce grievance and arbitration requirements in labor contracts. This policy is subject to exception only when the record contains "the most forceful evidence of a purpose to exclude the claim from arbitration."[33] No such evidence is found in the present record. On the contrary, plaintiffs themselves recognized their obligation to comply with the contractual provisions for settling disputes by filing grievance petitions raising the very question involved in the present petition. Judge Gibbons' holding was in direct conflict with the decisions of the Supreme Court in the cited cases (fn.33) and in the *Maddox* case and with the decisions of the Court of Appeals for the Eighth Circuit in the *Kelwood* and *General Steel Industries* cases.

II. THE PARTICIPANTS ARE REQUIRED TO SUBMIT THEIR CLAIMS TO ARBITRATION UNDER THE PENSION AGREEMENT

Plaintiffs have sued under the pension agreement between petitioner and plaintiffs' bargaining representative, the United Steelworkers of America. The arbitration clause of that agreement, section 7.1 (15a), provides for arbitration of any controversy relating to claims for pension benefits. The District Court nevertheless held the arbitration clause inapplicable, on the ground that plaintiffs were not applicants for pensions and that the amounts of their pensions were not in dispute.

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33. *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 at p. 585 (1960); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960); *Collyer Insulated Wire*, 192 NLRB 837 (1971). The first three of these cases are those referred to by Judge Dumbauld as the "Steel Trilogy."(14a).

Plaintiffs are applicants for pensions. An "applicant" is defined as "one who applies for something", and "apply" as "to make an appeal or a request esp. formally and often in writing and usu. for something of benefit to oneself." (Webster's Third International Dictionary, Unabridged, Merriam, Springfield, Mass. 1961). By filing the present action plaintiffs formally applied to petitioner for pension moneys to be paid to them by petitioner. Plaintiffs are therefore applicants for pensions.

The amounts of the pensions claimed by plaintiffs are also in dispute. They contend that they are entitled to certain dollar amounts from petitioner; petitioner disputes that they are entitled to as much as they claim and, further, contends that it is not obligated to pay them any amounts at all. The amounts of their pensions are thus in dispute. The pension agreement requires such dispute to be settled by arbitration.

Arbitration clauses in pension agreements must be obeyed: *Amato v Bernard*, 618 F. 2d 559 (9th Cir. 1980); *Challenger v. Local U. No. 1 of Intern. Bridge*, 619 F.2d 645 (7th Cir. 1980). In refusing to enforce the arbitration clause in the pension agreement in suit, the courts below rendered a decision in conflict with the decisions of the Courts of Appeals of the Seventh and Ninth Circuits.

III. THE SUCCESSOR TO THE PLAN ITSELF (A STATUTORY ENTITY) AND THE INSURER SHOULD HAVE BEEN MADE PARTIES TO THE ACTION

F.R.C.P. 19(a) provides that a person subject to service of process " shall be joined as a party . . . if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest . . . and . . . disposition of the action in his absence may (i) . . . impair or impede his ability to protect that interest or

(ii) leave any of the persons already parties subject to a substantial risk of incurring double . . . obligations . . . ". A "person described in subdivision (a)(1)-(2)" of the rule is, according to subdivision (b), "regarded as indispensable."

ERISA expressly provides that a participant in a pension plan who is denied benefits to which he is entitled may sue the plan as an entity,[34] and the few cases in which the point has arisen have held that the plan is a necessary party: *Hill v. Iron Workers Local Union No. 25*, 520 F.2d 40 (6th Cir. 1975), and *Carter v. Montgomery Ward & Co.*, (supra, p. 15, fn. 26), 76 F.R.D. 565 (E.D. Tenn. 1977). The latter case also held (p. 568) that the employer was not a proper party.

Both of the above requirements of rule 19(a) for joining as a party to the present action the Heppenstall plan, or rather PBGC as successor in interest to the plan (ERISA section 4042, 29 U.S.C. §1342)(46a-47a) and as insurer of the plan (ERISA section 4022, 29 U.S.C. §1322)(46a), are present in the case at bar. In its absence complete relief cannot be accorded among plaintiffs and petitioner, because plaintiffs will not be able to recover what the plan and PBGC owe them under section 4022 (29 U.S.C. §1322)(46a), PBGC will not be able to recover what petitioner owes it under section 4062(b) (29 U.S.C. §1362(b))(48a-49a), and petitioner will be unable to compel PBGC to pay what it owes plaintiffs, in order to diminish petitioner's liability to them as required by the District Court's ruling (14a). If petitioner pays plaintiffs and PBGC also pays them and reimburses itself from 30% of petitioner's net assets, petitioner will be subject to the risk of paying twice.

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34. Section 502(d)(1), 29 U.S.C. §1132(d)(1)(39a-40a).

Failure to join an indispensable party is a defect so basic that it can be raised at any time, even on appeal: 3A Moore's Federal Practice ¶19.19, citing many cases (fn. 9, 10, 10a, 11, on p. 19-347). Petitioner at bar raised this point in the district court. In affirming the refusal of petitioner's motion to join PBGC as successor trustee under Heppenstall's plan, the court below rendered a decision in conflict with that of the Court of Appeals for the Sixth Circuit in the *Hill* case, supra (520 F.2d 40).

CONCLUSION

The need, not only by petitioner at bar but also by all the other employers in the country who have provided pension plans for their employees which may have to be terminated when the employers sustain economic reverses, for an authoritative determination of whether or not they will be liable for unfunded pension benefits in excess of 30% of their net worth is the principal reason for granting certiorari in the present case. The writ should be directed to issue.

Respectfully submitted,
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FILED
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CLERK

80-1909

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE HEPPENSTALL COMPANY,
Petitioner,

v.

WILLIAM A. MURPHY, MARVIN PEASE, WILLIAM ROGERS, EDWARD BANACHOSKI, ALBERT BETTS, WILLIAM FAHERTY, ALBERT CHRISTMAN, ROMAN KRYSINSKI, CHARLES MANJEROVIC, WALTER REGAN, JOHN AUSTIN, JR., FRANK CONIGLIO, FRANK KUSH, LAWRENCE WIESEN, JOHN CHMILL AND SIDNEY ROBINSON,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDICES
TO
PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1690 and 80-1724

WILLIAM A. MURPHY, MARVIN PEASE, WILLIAM ROGERS, EDWARD BANACHOSKI, ALBERT BETTS, WILLIAM FAHERTY, ALBERT CHRISTMAN, ROMAN KRYSINSKI, CHARLES MANJEROVIC, WALTER REGAN, JOHN AUSTIN, JR., FRANK CONIGLIO, FRANK KUSH, LAWRENCE WIESEN, JOHN CHMILL AND SIDNEY ROBINSON

v.

THE HEPPENSTALL COMPANY,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 79-0817)

Argued October 14, 1980

Before GIBBONS and ROSENN, *Circuit Judges*, and HANNUM*, *District Judge*

(Opinion Filed December 10, 1980)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

Heppenstall Company (the employer) appeals from a grant of partial summary judgment in favor of sixteen retired Heppenstall employees (the employees). The employees sought directly from the employer the difference between the pension payments guaranteed by the Pension Benefit Guaranty Corporation (PBGC), and those

provided in the pension agreement negotiated between the employer and the United Steel Workers of America (the Agreement). Finding nothing in the Employee Retirement Income Security Act (ERISA) 29 U.S.C. §1001 et seq., to preempt contract claims against the employer for pension benefits in excess of those guaranteed by PBGC, we affirm.

I. *Facts and Proceedings Below*

The underlying facts are the same as in *Pension Benefit Guaranty Corp. v. Heppenstall Co.*, No. 79-2225, decided by this court July 30, 1980. In the present action, 16 retired employees brought their contract-based pension benefits claim to the district court two weeks before that court issued its order terminating the employees' pension plan. Invoking 29 U.S.C. §1132(e) jurisdiction over actions to enforce rights under a pension plan, the employees argued the terms of the pension agreement obligated the employer itself, rather than a fund or an insurer, to pay pension benefits even after termination or expiration of the agreement.

The employer moved to dismiss, urging that the pension agreement did not make Heppenstall directly liable for pension benefits to its employees, that any claim for pension benefits must either be arbitrated, or be resolved in the proceeding terminating the pension plan, and that ERISA preempts contract claims against the employer for sums in excess of those guaranteed by the PBGC. The district court denied the motion to dismiss, and granted partial summary judgment for the employees, postponing the determination of amounts due the employees, but certifying that the summary judgment of liability was a controlling question which should be reviewed pursuant to 28 U.S.C. §1292(b).[1]

1. In issuing the §1292(b) order, the court ruled:

said orders involve a controlling question of law as to which there is a substantial ground for difference of opinion and that

II. *Discussion*

The disputed portion of the Heppenstall-United Steelworkers pension agreement provides:

> Section 10.2
>
> Any benefit properly payable pursuant to this Agreement shall continue to be payable, notwithstanding the termination or expiration of this Agreement.
>
> In the event that this Agreement is terminated, in whole or in part, the rights of any participant with respect to whom such termination shall have occurred shall, from the date of such termination or partial termination, be fully vested and nonforfeitable, subject to divestment by reason of death or operation of law, in the benefits established under the Agreement as of the date of such termination or partial termination is effective to the extent those benefits are funded by the Company in accordance with the provisions of Section 8 of this Agreement.

NOTE 1 — *(Continued)*

an immediate appeal from said orders may materially advance the ultimate termination of the litigation, for if this Court's conclusion that the instant case is independent of the proceedings involving the Pension Benefit Guaranty Corporation is incorrect, and defendant's position is sustained that plaintiffs have no remedy except such as may be obtained in the proceedings at Nos. 79-2224 and 2225, the instant case would be immediately terminated without need to complete the calculations of the amounts payable to each employee entitled to pension benefits under the collectively bargained contract.

On a Section 1292(b) appeal we consider all grounds which might require a reversal of the order appealed from. *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032 (3d Cir. 1974); *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.) (in banc), *cert. denied*, 419 U.S. 885 (1974); *Johnson v. Aldredge*, 448 F.2d 820 (3d Cir. 1973), *cert. denied sub nom. Conrath v. Johnson*, 419 U.S. 882 (1974).

Section 8.1 reads:

> For the purpose of supplying the pension benefits herein provided, the Company may establish or cause to be established, a pension trust or trusts or may utilize any existing trust or trusts heretofore established by or on behalf of the Company. The Company is free to determine the manner and means of making provision for funding and paying the pension benefits set forth in this Agreement.

The employer asserts the second sentence of Section 10.2 limits its direct liability to its employees. This sentence, however, added to conform to Internal Revenue Service-ERISA statutory vesting and funding standards, simply determines when participants' rights shall have vested in the event of termination of the pension plan. The "is effective" clause, on which the employer relies to limit liability, has no syntactical correspondent. Even were the verb plural, it would still fail to modify the right to receive benefits. We read the collection of clauses to mean: on the date the agreement terminates, participants' rights to benefits under the Agreement vest fully, to the extent the Company has funded the benefits, as provided in Section 8.

Read this way, Section 10.2 might at first seem to take away what it gives: participants' rights vest "fully," but if the employer fails to fund a pension trust, participants have fully vested rights in scant benefits. In fact, however, the employees have rights to benefits under the Collective Bargaining Pension Agreement, not merely under a pension trust. Section 8.1 establishes that the employer may set up a pension trust, and fund it as he wills, but the provision does not confine the employer's liability for pension benefits to a pension trust. Section 8.1, then, does not oblige the employer to fund any trust; the employer could be directly liable for all pension payments due under the Agreement. Read together, Sections 8.1 and 10.2 thus confirm the employer's con-

tinuing direct liability for post-termination pension payments.[2]

The employer also relies on the pension Agreement's arbitration clause to maintain the employees may not bring their pension benefits claim in court. The arbitration clause, however, governs disputes concerning an employee-applicant's right to a pension, or the amount of a pension. This action does not address a dispute over these employees' rights under the pension agreement. The plaintiffs in this action are retired employees; their rights have already vested. This action instead concerns the enforceability of the Agreement's direct liability clause. If the clause is enforceable, the employees rights under it are clear.[3]

The employer's remaining arguments center on interpretation of several sections of ERISA. The employer

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2. In addition, Section 1.3 of the Agreement provides:

> Subject to the corporate actions required to provide the pension benefits and to the Company's obtaining and/or retaining [favorable tax treatment for the plan], the following pension benefits shall be provided by the Company or caused to be provided by the Company for the participants.

The second sentence of Section 10.2 details one of the corporate actions requisite to retaining favorable tax treatment. Section 1.3 thus makes clear that the disputed sentence in Section 10.2 was never meant to divest retirees of their pension payments.

3. The arbitration clause provides:

> If any difference shall arise between the Company and any participant who shall be an applicant for a pension as to such participant's right to a pension or the amount of his pension and agreement cannot be reached between the Company and a representative of the International Union, such question shall be referred to an impartial umpire to be selected by the Company and the Union. The impartial umpire shall have authority only to decide the question pursuant to the provisions of this agreement applicable to the question — but he shall not have authority in any way to alter, add to or subtract from any of such provisions. The decision of the impartial umpire on any such question shall be binding on the Company, the Union and the participant.

maintains 29 U.S.C. §1342(f) mandates the employee's pension benefits claim be adjudicated solely in the pension plan termination proceeding. Section 1342(f) states:

> Exclusive Jurisdiction; stay of other proceedings:
>
> (f) Upon the filing of an application for the appointment of a trustee or the issuance of a decree under this section, the court to which an application is made shall have exclusive jurisdiction of the plan involved and its property wherever located with the powers, to the extent consistent with the purposes of this section, of a court of bankruptcy and of a court in a proceeding under Chapter X of Title II. Pending an adjudication under subsection (c) of this section such court shall stay, and upon appointment by it of a trustee, as provided in this section such court shall continue the stay of, any pending bankruptcy, mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the plan or its property and any other suit against any receiver, conservator, or trustee of the plan or its property. Pending such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce a lien against property of the plan or any other suit against the plan.

By its own terms, Section 1342(f) does not apply to this action. The employees are not suing the pension plan. They are suing the employer for the difference between payments due under the pension plan, as guaranteed by the PBGC, and payments due directly from the employer under the collectively bargained pension Agreement. The sole defendant, and the sole source of the employees' recovery in this action is the employer.[4]

4. The employer has argued the PBGC and the pension plan are indispensible parties to this action. On our reading of the pension Agreement and our disposition of the employer's argument under §1342(f) it is unnecessary to join either the PBGC or the pension plan

Finally, the employer asserts ERISA preempts contract claims for benefits in excess of those guaranteed by the PBGC. The employer's statutory argument is three-fold. The employer maintains 29 U.S.C. §1144, ERISA's preemption section, limits employees' rights in pension benefits to those rights ERISA creates. The employer further argues that 29 U.S.C. §§1362 and 1322 place a cap on, respectively, the employer's liability for pension benefits, and the employees' right to receive employer-funded benefits. Neither the words of the statute, nor its legislative history warrant these conclusions.

29 U.S.C. §1144 supercedes "state law relating to" a pension plan.[5] The employees' contract claim against the employer is not a state law claim. Rather, their claim arises under both the federal common law of labor-management contracts, and the federal common law of pension plans. Because the employees are seeking to enforce a provision of a collectively bargained pension agreement, federal common law applies. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (the broad jurisdictional grant of §301(a) of the Taft-Hartley Act, 29 U.S.C. §185(a) authorizes creation of federal common law of labor-management contracts); *Sheeran v. General Electric Co.*, 593 F.2d 93, 96 (9th Cir. 1977) (individual employees may bring suit in federal court for breach of collective bargaining agreement).

Moreover, except for explicitly exempted plans, ERISA wholly regulates and federalizes the pension field. Section 1144 preempts any state law relating to

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5. 29 U.S.C. §1144 provides:

§1144 Other laws

Supercedure; effective date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title. This section shall take effect on January 1, 1975.

ERISA-covered pension plans. Furthermore, like the Taft-Hartley Act grant of jurisdiction over labor-management contracts, ERISA in Section 1132(a) and (e) confers jurisdiction over actions concerning rights and benefits under a pension plan. In enacting ERISA, Congress authorized the evolution of a federal common law of pension plans. *See* ERISA Conference Report, remarks of Senator Javits: "It is also intended that a body of federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." III Leg. Hist. of the Employees Retirement Income Security Act of 1974, 4771; *In Re C.D. Moyer Trust Fund*, 441 F. Supp. 1128, 1131 (E.D. Pa. 1977) ("under ERISA's legislative scheme, this court is empowered to formulate rules of law to govern various aspects of the employee benefit field," citing Sen. Javits' remarks), *aff'd without opinion*, 582 F.2d 1273 (3d Cir. 1978). Thus Section 1144 does not preempt direct employer liability under a pension agreement. We must therefore determine if that liability is inconsonant with some other facet of the statutory scheme.

The employer maintains the federally insured pension benefits set out in Title IV of ERISA, 29 U.S.C. §§1301-81, afford employees all the pension rights to which they are entitled. Any benefits in excess of the statutory provisions, it urges, would be inconsistent with the Congressional program of limiting employer liability for pension benefits. The employer misreads the plain wording of the statute, and misconstrues the legislative purpose motivating its enactment. Sections 1362 and 1322, which the employer invokes as expressions of Congressional intent to limit employer liability, in no way address pension benefits directly recoverable from the employer. Section 1362(b) does place a ceiling on employer liability for pension payments, but that liability

is to the PBGC.[6] Similarly, Section 1322(a)(b)(1)(2)(3) limits the pension payments employees may recover from the PBGC[7]. Two lower federal courts have expressly held that the limitation in Section 1362 of employer liability to the PBGC does not limit the employer's direct contractual liability to its employees. *In The Matter of M & M Transportation Company*, No. 79 Civ. 5968 (S.D.N.Y. April 16, 1980), Pension and Profit Sharing (P-H) ¶ 135,497 (5/30/80); *In Re Alan Wood Steel Co.*, Bankruptcy No. 77-930 (E.D. Pa. 1978), 212 BNA Pension Reporter D-1 (10/30/78).

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6. Section 1362(b) reads:

Amount of Liability

(b) Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—

(1) the excess of—

(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

7. Section 1322(a) and (b)(1)(2)(3) read:

Benefits guaranteed

(a) Subject to the limitations contained in subsection (b) of this section, the corporation shall guarantee the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when section 1321 of this title applies to it.

(b) (1) Except to the extent provided in paragraph (8)—

(A) no benefits provided by a plan which has been in effect for less than 60 months at the time the plan terminates shall be guaranteed under this section, and

(B) any increase in the amount of benefits under a plan resulting from a plan amendment which was made, or became

In *Nachman Corp. v. PBGC*, 48 U.S.L.W. 4524 (5/13/80), the Supreme Court reviewed Congress' concerns in enacting ERISA:

> One of Congress' central purposes in enacting this complex legislation was to prevent the "great personal tragedy" suffered by employees whose vested benefits are not paid when pension plans are terminated. Congress found "that owing to the inadequacy of current minimum standards, the

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effective, whichever is later, within 60 months before the date on which the plan terminates shall be disregarded.

(2) For purposes of this subsection, the time a successor plan (within the meaning of section 1321(a) of this title) has been in effect includes the time a previously established plan (within the meaning of section 1321(a) of this title) was in effect. For purposes of determining what benefits are guaranteed under this section in the case of a plan to which section 1321 of this title does not apply on September 3, 1974, the 60 month period referred to in paragraph (1) shall be computed beginning on the first date on which such section does apply to the plan.

(3) The amount of monthly benefits described in subsection (a) of this section provided by a plan, which are guaranteed under this section with respect to a participant, shall not have an actuarial value which exceeds the actuarial value of a monthly benefit in the form of a life annuity commencing at age 65 equal to the lesser of—

(A) his average monthly gross income from his employer during the 5 consecutive calendar year period (or, if less, during the number of calendar years in such period in which he actively participates in the plan) during which his gross income from that employer was greater than during any other such period with that employer determined by dividing 1/12 of the sum of all such gross income by the number of such calendar years in which he had such gross income, or

(B) $750 multiplied by a fraction, the numerator of which is the contribution and benefit base (determined under section 430 of Title 42) in effect at the time the plan terminates and the denominator of which is such contribution and benefit base in effect in calendar year 1974.

The provisions of this paragraph do not apply to non-basic benefits.

> soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits." ERISA §2(a), 29 U.S.C. §1001(a). Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—that he actually receive it. The termination insurance program is a major part of Congress' response to the problem. Congress provided for a minimum funding schedule and prescribed standards of conduct for plan administrators to make as certain as possible that pension fund assets would be adequate. But if a plan nonetheless terminates without sufficient assets to pay all vested benefits, the PBGC is required to pay them—within certain dollar limitations not applicable here—" from funds established by that corporation. [footnotes omitted]

48 U.S.L.W. at 4528. Under 29 U.S.C. §1362(b), the PBGC can recover from the terminating employer up to 30% of its net worth in order to defray the costs of compensating retired employees.

The *Nachman* Court held that an employer's limitation of liability to sums within a pension fund did not eliminate the PBGC's guaranty of accrued, unfunded benefits. Had Nachman Corporation's interpretation prevailed, the PBGC would not have been obliged to pay pension claims, and thus could not have proceeded against Nachman for 30% of its net worth. The Court did not, however, rule that ERISA prohibited any disclaimer of direct liability. Rather, it maintained, the 30% reimbursement provision demonstrated Congress' intention to preserve employers' "right to place a contractual limit on their direct liability to their employees.." 48

U.S.L.W. at 4531. If the employer may limit direct liability, direct liability must persist under ERISA. Otherwise *Nachman* would nonsensically permit restrictions on a form of liability the statute had precluded.

ERISA established "minimum standards" for pension payments due retired employees. Congress endeavored to guarantee retirees at least a portion of the payments a terminated pension plan would have afforded. It is not inconsistent with the statutory scheme to permit employees to recover directly from the employer any additional benefits to which the employer has contractually obligated itself. While the effect of permitting that additional recovery may reduce the employer's net worth, and thus decrease the amount the PBGC may recover from the employer, the PBGC in its amicus brief to this court has taken a position supporting the employees' right to recover directly from the employer. Because nothing in ERISA, nor in its legislative history, nor in the views expressed by the government corporation charged with administering ERISA-guaranteed pension payments discountenances direct contractual recovery of pension benefits from the employer, we will affirm the district court's grant of summary judgment of liability in favor of the employees.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

B OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM A. MURPHY, et al.,
Plaintiffs,
v.
THE HEPPENSTALL COMPANY,
Defendant.

Civil Action
No. 79-817 Q.
Aug. 8, 1979.

William H. Powderly, III, Reed, Smith, Shaw & McClay, Pittsburgh, Pa., for defendant.

Frank J. Lucchino, Pittsburgh, Pa., for plaintiffs.

OPINION

DUMBAULD, District Judge.

Plaintiffs are retired employees of defendant Heppenstall Company who had been receiving pension benefits until defendant's financial position became straitened and payments stopped. In a cognate case this Court by order of June 28, 1979, in No. 78-1431 terminated defendant's plan in pursuance of ERISA, and benefits guaranteed under that statute will be paid to defendant's employees by the Pension Benefit Guaranty Corporation. Any recovery from defendant would be of course diminished by such amounts, if any, as may be paid by PBGC. Defendant moves to dismiss or refer to arbitration, relying on the policy in favor of labor arbitration enunciated in the *Steel Trilogy* and other cases.

The *sedes materiae* of plaintiffs' claim is found in Section 1.3 of the pension agreement between defendant and Local 1601 of the United Steelworkers (Ex. 1 to Motion). It is there agreed that "Subject to the corporate

action required to provide the pension benefits [and to IRS approval; and it is not disputed that these conditions have been complied with[1]] the following pension benefits shall be provided by the Company or caused to be provided by the Company for the participants."[2]

Section 7.1 provides that:

> If any difference shall arise between the Company and any participant who shall be an applicant for a pension as to such participant's right to a pension or the amount of his pension [an impartial umpire shall decide] pursuant to the provisions of this agreement.

Section 8.1 reads:

> For the purpose of supplying the pension benefits herein provided, the Company may establish or cause to be established, a pension trust or trusts or may utilize any existing trust or trusts heretofore established by or on behalf of the Company. The Company is free to determine the manner and means of making provision for funding and paying the pension benefits set forth in this Agreement.[3]

Section 10.2 of both agreements provides:

> Any benefit properly payable pursuant to this Agreement shall continue to be payable, notwithstanding the termination or expiration of this Agreement.

An amendment required by IRS to conform to ERISA added a new sentence to Section 10.2:

> In the event that this Agreement is terminated, in whole or in part, the rights of any participant

---

1. Section 10.7 provides that in the absence of compliance with these conditions the Union shall be free to strike "with respect to matters relating to pensions only." This shows that the pension agreement is a collectively bargained labor agreement.

2. An identical Section 1.3 is contained in the agreement with Local 7378 (Ex. 3).

3. Ex. 1. This provision is identical in Ex. 3.

> with respect to whom such termination shall have occurred shall, from the date of such termination or partial termination, be fully vested and nonforfeitable, subject to divestment by reason of death or operation of law, in the benefits established under the Agreement as of the date of such termination or partial termination is effective to the extent those benefits are funded by the Company in accordance with the provisions of Section 8 of this Agreement.

Defendant contends that it is not liable for any benefits in excess of those payable from the (now exhausted) trust fund which it established. The fund consisted only of "such sums of money and other property . . . as shall from time to time be paid or delivered to such Trustee in accordance with the provisions of the Plan." Section 1.1, Ex. 8. The trustee has no right or duty to require payment of any contribution. Section 2.1. The Trustee merely administers pursuant to the Plan whatever amounts defendant puts into the fund.

It is of course true that an employer is free (apart from any requirements which ERISA may have imposed) to limit its liability for pensions to a particular fund. *Boase v. Lee Rubber & Tire Corp.*, 437 F.2d 527, 528-29 (C.A. 3, 1970); *Baake v. Gen. Am. Transp. Corp.*, 351 F.Supp. 962, 964 (N.D.Ill. E.D. 1972); *Briggs v. Michigan Tool Co.*, 369 F.Supp. 920, 924 (E.D.Mich. S.D. 1974). However, the language used for the employers' limitation of liability in those cases is much clearer than that used by defendant in the agreements under consideration in the case at bar.

Defendant squarely agreed that the stipulated benefits were to be "provided . . . or caused to be provided" by defendant. It was free either to employ a funded trust or to make direct payments, as it might see fit. It is nowhere stated that the only benefits for which defendant is to be

liable are those derivable from the assets of the trust fund.

Plaintiffs are suing on defendant's contractual agreement, in what would have been an action of *indebitatus assumpsit* at common law. If defendant becomes a bankrupt plaintiffs could claim as unsecured creditors for non-performance of liability contracted for under the agreement.

Nor can defendant rely on the IRS-required amendment to Section 10.2 as an exculpatory clause. That amendment simply provides, giving effect to ERISA, that rights of participants shall become vested and nonforfeitable upon termination of the agreement to the extent that fund assets are available. This has no application to plaintiffs whose pension rights had previously been consummated upon actual retirement.

In spite of the policy in favor of Labor arbitration, the scope of arbitration is governed by the particular language used in the arbitration clause. It seems plain that the clause here does not cover plaintiffs' claim of assumpsit. The arbitration clause is limited in regard to parties and subject-matter to (1) disputes between defendant and an "applicant for a pension" [plaintiffs are not applicants, they have been receiving pensions while the payments continued]; (2) disputes as to a participant's "right to a pension or the amount of his pension" [here there is no such dispute; the problem is simply one of non-payment of the amount due].

Accordingly, defendant's motion must be denied. Plaintiffs' action for breach of contract must proceed to trial in due course.

ORDER

AND NOW, this 8th day of August, 1979, for the reasons set forth in the foregoing opinion, it is ordered that defendant's motion to dismiss or for arbitration be and the same hereby is denied.

Dumbauld
UNITED STATES SENIOR
DISTRICT JUDGE

Copies to:

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Daniel P. McIntyre, Esquire
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C ORDER OF THE DISTRICT COURT ENTERED APRIL 1, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM A. MURPHY, et al., Plaintiffs v. THE HEPPENSTALL COMPANY, Defendant.	Civil Action No. 79-817

ORDER

AND NOW, this April 1, 1980, upon consideration of defendant's motion to dismiss for lack of jurisdiction and upon other grounds, and of plaintiffs' motion for summary judgment, and of briefs in support thereof, and in opposition thereto, after argument, and the Court being of opinion that 29 U.S.C. 1132(*f*) grants to district courts "jurisdiction without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action;" and that 29 U.S.C. 1132(a)(1)(B) provides that a civil action may be brought by a participant or beneficiary of a plan "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his right to future benefits under the terms of the plan;" and that no limitation is imposed by said language with respect to the defendants against whom or which such action may be brought, and hence such an action in an appropriate case might be brought against an employer corporation rather than against the plan as an entity or a trustee; and that the contractual benefit provisions upon which plaintiffs rely constitute a "plan" within the meaning of 29 U.S.C. 1002(2) and (3); and that accordingly, this Court has jurisdiction of the instant case and that defendant's motion to dismiss for

lack of jurisdiction should be denied; and that defendant's other grounds have been ruled upon in this Court's opinion of August 8, 1979 [473 F.Supp. 783] defendant's pending motion to reconsider which is hereby denied, and hence that defendant's motion to dismiss should be denied, and plaintiffs' request at oral argument to withdraw pending motion to amend is hereby granted; and the Court being further of opinion, with respect to plaintiffs' motion for partial summary judgment that the case is one based upon the construction of written documents which are before the Court and that there are no disputed matters nor any genuine issue as to any material fact requiring additional testimony or proof with respect to liability; and the Court being of opinion, for the reasons set forth in 473 F.Supp. 783, that the moving party is entitled to judgment as a matter of law on the issue of liability;

IT IS ORDERED, ADJUDGED, DECREED, AND FINALLY DETERMINED that defendant's motion to dismiss be and the same hereby is denied; that plaintiffs' motion for partial summary judgment be and the same hereby is granted; and that judgment be and it hereby is entered for the plaintiffs and against the defendant for such sums as each plaintiff individually is entitled to pursuant to the terms of the applicable contracts providing for pension benefits; provided that the Court reserves jurisdiction to determine the precise dollar amounts payable under the judgment in accordance with the circumstances established with respect to each individual entitled to pension benefits, and counsel are urged to stipulate the amounts so payable; and the Court further reserves the right to stay execution with respect to the particular amounts as may hereafter be determined, to the extent necessary to prevent double recovery in the event that part of such amounts so payable shall have been paid to plaintiffs by Pension Benefit Guarantee Corporation or any other person than defendant, and defend-

ant shall be given credit against the judgment for any sums so paid to plaintiffs from collateral sources.

Dumbauld
UNITED STATES SENIOR
DISTRICT JUDGE

Copies to:

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Washington, D.C. 20006

D ORDER OF THE DISTRICT COURT ENTERED APRIL 23, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM A. MURPHY, et al.,
Plaintiffs,
v.
HEPPENSTALL COMPANY,
Defendant.

Civil Action
No. 79-817

ORDER

AND NOW, this 23rd day of April, 1980, upon consideration of defendant's motion to certify this Court's orders of August 8, 1979, and April 1, 1980, for appeal under 28 U.S.C. 1292(b); and this Court being of opinion that said orders constitute a final judgment in favor of plaintiffs except for calculations of the amounts due in an action of contract against the sponsor of a pension benefit plan [see 473 F.Supp. 783]; and this Court having in said orders rejected defendant's contention that this Court lacks jurisdiction of the instant case upon the ground that recovery of pension benefits can be had only against the plan itself and to the extent of its assets together with such benefits as may be provided by the Pension Benefit Guaranty Corporation in another proceeding now on appeal as Nos. 79-2224 and 2225, wherein this Court made a determination of involuntary determination under 29 U.S.C. 1342 in its order of *June 28, 1979,* at No. 78-1431; and this Court having likewise rejected defendant's contention that said Pension Benefit Guaranty Corporation is an indispensable party to the instant case; and this Court being of opinion that said orders involve a controlling question of law as to which there is a substantial ground for difference of opinion and that an

immediate appeal from said orders may materially advance the ultimate termination of the litigation, for if this Court's conclusion that the instant case is independent of the proceedings involving the Pension Benefit Guaranty Corporation is incorrect, and defendant's position is sustained that plaintiffs have no remedy except such as may be obtained in the proceedings at Nos. 79-2224 and 2225, the instant case would be immediately terminated without need to complete the calculations of the amounts payable to each employee entitled to pension benefits under the collectively bargained contract.

IT IS ORDERED that said orders of August 8, 1979, and April 1, 1980, be supplemented by adding thereto and incorporating therein the statements contained in this order.

Dumbauld
UNITED STATES SENIOR
DISTRICT JUDGE

Copies to:

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E JUDGMENT OF THE COURT OF APPEALS ENTERED DECEMBER 10, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 80-1690 and 80-1724

WILLIAM A. MURPHY, MARVIN PEASE, WILLIAM ROGERS, EDWARD BANACHOSKI, ALBERT BETTS, WILLIAM FAHERTY, ALBERT CHRISTMAN, ROMAN KRYSINSKI, CHARLES MANJEROVIC, WALTER REGAN, JOHN AUSTIN, JR., FRANK CONIGLIO, FRANK KUSH, LAWRENCE WIESEN, JOHN CHMILL AND SIDNEY ROBINSON

vs.

THE HEPPENSTALL COMPANY, Appellant

(D.C. Civil No. 79-0817)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS and ROSENN, *Circuit Judges* and HANNUM, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on October 14, 1980.

* Honorable John B. Hannum, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered April 1, 1980, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:
M. Elizabeth Ferguson
Chief Deputy Clerk

December 10, 1980

F ORDER OF THE COURT OF APPEALS ENTERED JANUARY 8, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 80-1690 and 80-1724

WILLIAM A. MURPHY, MARVIN PEASE, WILLIAM ROGERS, EDWARD BANACHOSKI, ALBERT BETTS, WILLIAM FAHERTY, ALBERT CHRISTMAN, ROMAN KRYSINSKI, CHARLES MANJEROVIC, WALTER REGAN, JOHN AUSTIN, JR., FRANK CONIGLIO, FRANK KUSH, LAWRENCE WIESEN, JOHN CHMILL AND SIDNEY ROBINSON v. THE HEPPENSTALL COMPANY, Appellant	(D.C. Civil No. 79-0817)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges*

The petition for rehearing filed by
Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the

decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

John J. Gibbons
Judge

Dated: January 9, 1981

G THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

RETIREMENT INCOME SECURITY ACT P.L. 93-406 TITLE I-PROTECTION OF EMPLOYEE BENEFIT RIGHTS

SUBTITLE A -GENERAL PROVISIONS

FINDINGS AND DECLARATION OF POLICY

Sec. 2. (a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retire-

ment benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desireable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

DEFINITIONS

Sec. 3. For purposes of this title:

* * *

(2) The terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(A) provides retirement income to employees, or

(B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * *

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

* * *

(11) The term "commerce" means trade, traffic, commerce, transportation, or communication between any State and any place outside thereof.

(12) The term "industry or activity affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry "affecting commerce" within the meaning of Labor Management Relations Act, 1947,[2] or the Railway Labor Act.[3]

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(16) (A) The term "administrator" means—

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

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(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an

2 29 U.S.C.A. 141 et seq.

3 45 U.S.C.A. 151 et seq.

immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 203(a)(3).

* * *

(31) The term "advance funding actuarial cost method" or "actuarial cost method" means a recognized actuarial technique utilized for establishing the amount and incidence of the annual actuarial cost of pension plan benefits and expenses. Acceptable actuarial cost methods shall include the accrued benefit cost method (unit credit method), the entry age normal cost method, the individual level premium cost method, the aggregate cost method, the attained age normal cost method, and the frozen initial liability cost method. The terminal funding cost method and the current funding (pay-as-you-go) cost method are not acceptable actuarial cost methods. The Secretary of the Treasury shall issue regulations to further define acceptable actuarial cost methods.

* * *

(35) The term "defined benefit plan" means a pension plan other than an individual account plan;. . .

* * *

COVERAGE

Sec. 4. (a) Except as provided in subsection (b) and in section 201, 301, and 401, this title shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this title shall not apply to any employee benefit plan if—

(1) such plan is a governmental plan (as defined in section 3(32));

(2) such plan is a church plan (as defined in section 3(33)) with respect to which no election has been made under section 410(d) of the Internal Revenue Code of 1954;[12]

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 3(36)) and is unfunded.

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SUBTITLE B - REGULATORY PROVISIONS

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PART 2 - PARTICIPATION AND VESTING COVERAGE

Sec. 201. This part shall apply to any employee benefit plan described in section 4(a) (and not exempted under section 4(b)) other than—

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12 26 U.S.C.A. (I.R.C. 1954) 410(d).

(1) an employee welfare benefit plan;

(2) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees;

(3)(A) a plan established and maintained by a society, order, or association described in section 501(c)(8) or (9) of the Internal Revenue Code of 1954,[19] if no part of the contributions to or under such plan are made by employers of participants in such plan, or

(B) a trust described in section 501(c)(18) of such Code;

(4) a plan which is established and maintained by a labor organization described in section 501(c)(5) of the Internal Revenue Code of 1954 and which does not at any time after the date of enactment of this Act provide for employer contributions;

(5) any agreement providing payments to a retired partner or a deceased partner's successor in interest, as described in section 736 of the Internal Revenue Code of 1954;

(6) an individual retirement account or annuity described in section 408 of the Internal Revenue Code of 1954, or a retirement bond described in section 409 of such Code;[20] or

(7) an excess benefit plan.

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19 26 U.S.C.A. (I.R.C. 1954) 501(c)(8), (9).

20 26 U.S.C.A. (I.R.C. 1954) 408, 409.

MINIMUM VESTING STANDARDS

Sec. 203. (a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

[paragraphs (1) - (3) omitted]

* * *

PART 3—FUNDING COVERAGE

Sec. 301. (a) This part shall apply to any employee pension benefit plan described in section 4(a), (and not exempted under section 4(b)), other than—

(1) an employee welfare benefit plan;

(2) an insurance contract plan described in subsection (b);

(3) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees;

(4)(A) a plan which is established and maintained by a society, order, or association described in section 501(c)(8) or (9) of the Internal Revenue Code of 1954,[33] if no part of the contributions to or under such plan are made by employers of participants in such plan; or

(B) a trust described in section 501(c)(18) of such Code;[34]

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33 26 U.S.C.A. (I.R.C. 1954) 501(c)(8).

34 26 U.S.C.A. (I.R.C. 1954) 501(c)(18).

(5) a plan which has not at any time after the date of enactment of this Act provided for employer contributions;

(6) an agreement providing payments to a retired partner or deceased partner or a deceased partner's successor in interest as described in section 736 of the Internal Revenue Code of 1954;[35]

(7) an individual retirement account or annuity as described in section 408(a) of the Internal Revenue Code of 1954,[36] or a retirement bond described in section 409 of such Code;[37]

(8) an individual account plan (other than a money purchase plan) and a defined benefit plan to the extent it is treated as an individual account plan (other than a money purchase plan) under section 3(35)(B) of this title; or

(9) an excess benefit plan.

* * *

MINIMUM FUNDING STANDARDS

Sec. 302. (a)(1) Every employee pension benefit plan subject to this part shall satisfy the minimum funding standard (or the alternative minimum funding standard under section 305) for any plan year to which this part applies. A plan to which this part applies shall have satisfied the minimum funding standard for such plan for a plan year if as of the end of such plan year the plan does not have an accumulated funding deficiency.

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35 26 U.S.C.A. (I.R.C. 1954) 736.

36 26 U.S.C.A. (I.R.C. 1954) 408(a).

37 26 U.S.C.A. (I.R.C. 1954) 409.

(2) For the purposes of this part, the term "accumulated funding deficiency" means for any plan the excess of the total charges to the funding standard account for all plan years (beginning with the first plan year to which this part applies) over the total credits to such account for such years or, if less, the excess of the total charges to the alternative minimum funding standard account for such plan years over the total credits to such account for such years.

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(c)(1) For purposes of this part, normal costs, accrued liability, past service liabilities, and experience gains and losses shall be determined under the funding method used to determine costs under the plan.

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(3) For purposes of this part, all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan.

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PART 4 - FIDUCIARY RESPONSIBILITY COVERAGE

Sec. 401. (a) This part shall apply to any employee benefit plan described in section 4(a) (and not exempted under section 4(b)), other than—

[exceptions omitted]

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ESTABLISHMENT OF PLAN

Sec. 402. (a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

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ESTABLISHMENT OF TRUST

Sec. 403. (a) Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 402(a) or appointed by a person who is a named a fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—
[paragraphs (1)-(2) omitted].

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FIDUCIARY DUTIES

Sec. 404. (a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with

such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

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PART 5 - ADMINISTRATION AND ENFORCEMENT

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CIVIL ENFORCEMENT

Sec. 502. (a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

• • •

(d) (1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of contempt jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

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(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

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CLAIMS PROCEDURE

Sec. 503. In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

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EFFECT ON OTHER LAWS

Sec. 514. (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

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(c) For purposes of this section:

(1) The term "State Law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

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TITLE II - AMENDMENTS TO THE INTERNAL REVENUE CODE RELATING TO RETIREMENT PLANS

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Subtitle A - Participation, Vesting Funding, Administration, Etc.

PART I - PARTICIPATION, VESTING AND FUNDING

Sec. 1011. MINIMUM PARTICIPATION STANDARDS

Part I of subchapter D of chapter 1[84] (relating to pension, profit-sharing, stock bonus, plans, etc.) is amended by adding at the end thereof the following:

"Subpart B—Special Rules

"Sec. 410. Minimum participation standards.

"Sec. 411. Minimum vesting standards.

"Sec. 412. Minimum funding standards.

"Sec. 413. Collectively bargained plans.

"Sec. 414. Definitions and special rules.

"Sec. 415. Limitations on benefits and contributions under qualified plans.

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SEC. 1012 MINIMUM VESTING STANDARDS

(a) In general -Subpart B of part I of subchapter D of chapter 1[86] is amended by adding after section 410 the following new section:

"Sec. 411. MINIMUM VESTING STANDARDS

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84 26 U.S.C.A. (I.R.C. 1954) 401 et seq.

86 26 U.S.C.A (I.R.C. 1954) 410 et.seq.

SEC. 1013. MINIMUM FUNDING STANDARDS.

(a) In general.—Subpart B of part I of subchapter D of chapter 1[91] is amended by adding after section 411 the following new section:

"SEC. 412. MINIMUM FUNDING STANDARDS.

"(a) General rule.—Except as provided in subsection (h), this section applies to a plan if, for any plan year beginning on or after the effective date of this section for such plan—

"(1) such plan included a trust which qualified (or was determined by the Secretary or his delegate to have qualified) under section 401(a), or

"(2) such plan satisfied (or was determined by the Secretary or his delegate to have satisfied) the requirements of section 403(a) or 405(a).

A plan to which this section applies shall have satisfied the minimum funding standard for such plan for a plan year if as of the end of such plan year, the plan does not have an accumulated funding deficiency . . .

* * *

"(c) Special rules.—

"(1) Determinations to be made under funding method.—For purposes of this section, normal costs, accrued liability, past service liabilities, and experience gains and losses shall be determined under the funding method used to determine costs under the plan.

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91 26 U.S.C.A. (I.R.C. 1954) 410 et seq.

"(3) Actuarial assumptions must be reasonable.—For purposes of this section, all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan.

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TITLE IV - PLAN TERMINATION INSURANCE
Subtitle A - Pension Benefit Guaranty Corporation

DEFINITIONS

Sec. 4001. (a) For purposes of this title, the term—

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(4) "corporation", except where the context clearly requires otherwise, means the Pension Benefit Guaranty Corporation established under section 4002;

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PENSION BENEFIT GUARANTY CORPORATION

Sec. 4002. (a) There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation. In carrying out its functions under this title, the corporation shall be administered by the chairman of the board of directors in accordance with policies established by the board. The purposes of this title, which are to be carried out by the corporation, are—

(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,

(2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this title applies, and

(3) to maintain premiums established by the corporation under section 4006 at the lowest level consistent with carrying out its obligations under this title.

(b) To carry out the purposes of this title, the corporation has the powers conferred on a nonprofit corporation under the District of Columbia Nonprofit Corporation Act and, in addition to any specific power granted to the corporation elsewhere in this title or under that Act, the corporation has the power—

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal;

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Subtitle B - Coverage

PLANS COVERED

Sec. 4021. (a) Except as provided in subsection (b), this section applies to any plan (including a successor plan) which, for a plan year—

(1) is an employee pension benefit plan (as defined in paragraph (2) of section 3 of this Act) established or maintained-

(A) by an employer engaged in commerce or in any industry or activity affecting commerce, or

(B) by any employee organization, or organization representing employees, engaged in commerce or in any industry or activity affecting commerce, or

(C) by both,

which has, in practice, met the requirements of part I of subchapter D of chapter 1 of the Internal Revenue Code

of 1954[23] (as in effect for the preceding 5 plan years of the plan) applicable to plans described in paragraph (2) for the preceding 5 plan years; or

(2) is, or has been determined by the Secretary of the Treasury to be, a plan described in section 401(a) of the Internal Revenue Code of 1954,[24] or which meets or has been determined by the Secretary of the Treasury to meet, the requirements of section 404(a)(2) of such Code.[25]

For purposes of this title, a successor plan is considered to be a continuation of a predecessor plan. For this purpose, a successor plan is a plan which covers a group of employees which includes substantially the same employees as a previously established plan, and provides substantially the same benefits as that plan provided.

* * *

BENEFITS GUARANTEED

Sec. 4022. (a) Subject to the limitations contained in subsection (b), the corporation shall guarantee the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when section 4021 applies to it.

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SUBTITLE C - TERMINATIONS

* * *

TERMINATION BY CORPORATION

Sec. 4042. (a) The corporation may institute proceedings under this section to terminate a plan whenever it determines that—

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23 26 U.S.C.A. (I.R.C. 1954) 401 et seq.
24 26 U.S.C.A. (I.R.C. 1954) 401(a).
25 26 U.S.C.A. (I.R.C. 1954) 404(a)(2).

(1) the plan has not met the minimum funding standard required under section 412 of the Internal Revenue Code of 1954,[37] or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of such Code[38] has been mailed with respect to the tax imposed under section 4971(a) of such Code,[39]

(2) the plan is unable to pay benefits when due,

(3) the reportable event described in section 4043(b)(7) has occurred, or

(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

* * *

(b) Whenever the corporation makes a determination under subsection (a) with respect to a plan it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) ordering the termination of the plan....

(c) If the corporation has issued a notice under this section to a plan administrator and (whether or not a trustee has been appointed under subection (b)) has determined that the plan should be terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants and to avoid any further deterioration of the financial condition of the plan or any further increase in the liability of the fund.

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37 26 U.S.C.A. (I.R.C. 1954) 412.

38 26 U.S.C.A. (I.R.C. 1954) 6212.

39 26 U.S.C.A. (I.R.C. 1954) 4971(a).

. . . Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle....

* * *

ALLOCATION OF ASSETS

Sec. 4044. (a) In the case of the termination of a defined benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order: [paragraphs (1)-(6) omitted].

* * *

SUBTITLE D - LIABILITY

AMOUNTS PAYABLE BY THE CORPORATION

Sec. 4061. The corporation shall pay benefits under a plan terminated under this title subject to the limitations and requirements of subtitle B of this title. Amounts guaranteed by the corporation under section 4022 shall be paid by the corporation out of the appropriate fund.

LIABILITY OF EMPLOYER

Sec. 4062. (a) This section applies to any employer who maintained a plan (other than a multiemployer plan) at the time it was terminated, but does not apply— [exceptions omitted.]

(b) Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—

(1) the excess of—

(A) the current value of the plan's benefits guaranteed under this title on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

* * *

RECOVERY OF EMPLOYER LIABILITY FOR PLAN TERMINATION

Sec. 4067. The corporation is authorized to make arrangements with employers who are liable under section 4062, 4063, or 4064 for payment of their liability, including arrangements for deferred payment on such terms and for such periods as the corporation deems equitable and appropriate.

H INTERNAL REVENUE CODE OF AUGUST 16, 1954

INTERNAL REVENUE CODE
SUBCHAPTER D
DEFERRED COMPENSATION, ETC
PART I - PENSION, PROFIT-SHARING, STOCK BONUS PLANS, ETC.
SUBPART A - GENERAL RULE

§401. Qualified pension, profit-sharing, and stock bonus plans.

(a) Requirements for Qualification.-A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

(1) if contributions are made to the trust by such employer, or employees, or both, or by another employer who is entitled to deduct his contributions under section 404(a)(3)(B) (relating to deduction for contributions to profit-sharing and stock bonus plans), for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan;

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries;

(3) if the plan of which such trust is a part satisfies the requirements of section 410 (relating to minimum participation standards); and

(4) if the contributions or benefits provided under the plan do not discriminate in favor of employees who are—

(A) officers,

(B) shareholders, or

(C) highly compensated.

For purposes of this paragraph, there shall be excluded from consideration employees described in section 410(b)(2)(A) and (C).

* * *

§411. Minimum vesting standards.—

(a) General Rule.—A trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age (as defined in paragraph (8)) and in addition satisfies the requirements of paragraphs (1) and (2) of this subsection and the requirements of paragraph (2) of subsection (b), and in the case of a defined benefit plan, also satisfies the requirements of paragraph (1) of subsection (b).

* * *

(d) Special Rules.—

* * *

(3) Termination or partial termination; discontinuance of contributions.—Notwithstanding the provisions of subsection (a), a trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that—

(A) upon its termination or partial termination,

or

(B) in the case of a plan to which section 412 does not apply, upon complete discontinuance of contributions under the plan,

the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable....

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

(a) Exemption From Taxation.—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

INTERNAL REVENUE SERVICE
Ruling No. 71-91
1971 - 1 CB 116

A noncontributory pension plan that contains no funding arrangement but provides that the employer will pay the monthly pension directly to a retiree, does not meet the requirements of section 401(a) of the Code.

Rev. Rul. 71-91

A corporate employer established a noncontributory pension plan providing for a normal retirement benefit of $100 per month for each employee upon his retirement after the attainment of age 65. The plan provides that no contributions will be made on behalf of any employee prior to retirement. At retirement the employer will pay the monthly pension directly to the retiree. This type of arrangement is sometimes referred to as a "pay as you go" plan.

A plan may meet the requirements of section 401(a) of the Code only if contributions are used to establish a

trust of the type described in that section or to establish a custodial account of the type described in section 401(f) of the Code. For the purposes of sections 403(a) and 404(a)(2) of the Code, contributions may be used for the purchase of an annuity contract of the type described in those sections. Furthermore, for the purposes of sections 401, 402, 403, and 404 of the Code, contributions may be used for the purchase of face-amount certificates of the type described in section 401(g). In addition, in the case of bond purchase plans, contributions may be used for the purchase of retirement bonds of the type described in section 405(b) of the Code.

All of these plans are funded arrangements. Thus, a qualified plan must be a funded plan. It may not provide for direct payments by an employer to his employees, as in the case of the pay-as-you-go pension plan described in this case.

Accordingly, it is held that this plan does not meet the requirements of section 401(a) of the Code.

I.R.S. Pub. 778 (2-72), Part 2(b)

(b) Funded Plans

A qualified plan must be a funded plan. Contributions may be made to a trust or under a custodial account, or may be used to pay premiums on insurance contracts, or to purchase face-amount certificates or used to buy retirement bonds. A qualified plan does not provide for direct payments by an employer to his employees, as in the case of a pay-as-you-go pension plan. See Rev. Rul. 71-91, C. B. 1971-1, 116. However, employer contributions to or under a recognized funding medium may, under appropriate circumstances, be delayed pursuant to an established funding method. Thus, a qualified pension plan may provide that current contributions be made by employees only, but that the employer is obli-

gated to pay the full amount of the stipulated benefits to each retired employee-participant after the funds in the trust forming a part of such plan have been fully exhausted. See Rev. Rul. 54-152, C. B. 1954-1, 149. The employer may also make contributions in any year to substitute for the otherwise required employee contributions. Rev. Rul. 68-25, C. B. 1968-1, 151. It should be observed, however, that minimum funding requirements must be maintained even if contributions are made by employees only. See part 6(d) hereof.

I LEGISLATIVE HISTORY OF ERISA

[From the Congressional Record—House, Jan. 3, 1973.]

• • •

PUBLIC BILLS AND RESOLUTIONS

Under clause 4 of rule XXII, public bills and resolutions were introduced and severally referred as follows:

• • •

By Mr. Dent (for himself and Mr. Perkins):

H.R. 2. A bill to revise the Welfare and Pension Plans Disclosure Act; to the Committee on Education and Labor.

• • •

By Mr. Dent (for himself and Mr. Perkins):

H.R. 462. A bill to revise the Welfare and Pension Plan Disclosure Act; to the Committee on Education and Labor.

• • •

SAFEGUARDING PRIVATE PENSION PLANS

Mr. DENT. Mr. Speaker, I am pleased to submit to my colleagues and all others concerned about safeguarding the benefits of citizens who participate in private pension plans, two bills that I consider a "first step" toward our goal of securing retirement benefits earned during working years.

These measures are introduced today, on the first meeting of the 93rd Congress, to underscore the immediate need for congressional attention to the plight of workers who, for one reason or another, do not realize

the income to which they should be entitled upon retirement. I do not maintain that the two bills I put before the House today are the final answer to this complex problem, but they are the product of comprehensive studies in the field. It is my hope that they will serve as the vehicles by which we can renew our efforts to solicit constructive suggestions for reform of the private pension system, and fashion legislation which will eventually result in the enactment of meaningful safeguards for the rights of retirees.

It is my intention to call for hearings in Washington early next month before the General Subcommittee on Labor, and to press for early action on this issue.

[The texts of the bills as introduced follow:]

* * *

H.R. 462

* * *

PAYMENT OF INSURANCE

SEC. 204. (a) No plan insured under this title shall terminate without approval of the Secretary. The Secretary shall not approve a plan termination unless he is satisfied that the requirements of this Act and those of the Welfare and Pension Plans Disclosure Act have been complied with and that such termination is not designed to avoid or circumvent the purposes of this Act.

(b) As determined by the Secretary, subject to the conditions specified in section 202, the amount of insurance payable under the insurance program shall be the difference between the realized value of the plan's assets and the amount of vested liabilities under the plan.

RECOVERY

SEC. 205. (a) Where the employer or employers contributing to the terminating plan or who terminated the plan are not insolvent (within the meaning of section 1(19) of the Bankruptcy Act), such employer or employers shall be liable to reimburse the insurance program for any insurance benefits paid by the program to the beneficiaries of such terminated plan to the extent provided in this section.

(b) An employer, determined by the Secretary to be liable for reimbursement under subsection (a), shall be liable to pay a percentage of the terminated plan's unfunded vested liabilities equal to 100 per centum.

(c) The Secretary is authorized to make arrangements with employers, liable under subsection (a) for reimbursement of insurance paid by the Secretary including arrangements for deferred payment on such terms and for such periods as are deemed equitable and appropriate.

PENSION BENEFIT INSURANCE FUND

SEC. 206. (a) There is hereby created within the Treasury a separate fund for pension benefit insurance to be known as the Pension Benefit Insurance Fund (hereafter in this section called the fund) which shall be available to the Secretary without fiscal year limitation for the purposes of this title.

CALENDAR NO. 119

93d CONGRESS SENATE REPORT
1st SESSION No. 93-127

RETIREMENT INCOME SECURITY FOR EMPLOYEES ACT OF 1973

April 18, 1973.—Ordered to be printed

Mr. WILLIAMS, from the Committee on Labor and Public Welfare, submitted the following

REPORT

[To accompany S. 4]

The Committee on Labor and Public Welfare, to which was referred the bill (S. 4) to strengthen and improve the protections and interests of participants and beneficiaries of employee pension and welfare benefit plans, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

* * *

SECTION 210.—FUNDING REQUIREMENTS

The Committee believes that actuarially sound funding procedures are indispensable to effective implementation of the purposes of the Act. If employers never went out of business or terminated pension plans before they were completely funded, there would, no doubt, be no persuasive justification for funding standards aside from whatever tax considerations might be applicable. Nevertheless, employers do experience financial or economic difficulties or they undergo varying degrees of corporate reorganization, all of which can lead to premature termination of underfunded plans. A plan termination insurance program provides the essential safeguard

to the rights of workers who are trapped by these unforseen economic hazards but such a program cannot be made practical without being coupled to required standards of funding. To create a plan termination insurance program without appropriate funding standards would permit those who present the greatest risk in terms of exposure to benefit at the expense of employers who have developed conscientious funding programs. The funding standards contained in Section 210 are designed to lessen that unnecessary exposure by requiring every plan to be funded in a manner which will fully amortize unfunded liabilities in 30 years. 30 years was selected as representing more closely the funding period norm for most private plans. It is within the contemplation of the Committee that so-called "pay-as-you-go" or "terminal funded" plans are precluded under the requirements of this section.

* * *

SECTION 405.—RECOVERY

The Committee recognizes that in order to provide adequate protection to employees against loss of vested benefits owing to premature plan termination, it is necessary for the insurance program to cover all forms of plan termination regardless of the circumstances giving rise to the termination. The Committee also recognzed [sic] that some degree of employer liabiility was essential where the employer was not insolvent at the point of plan termination in order to preclude abuse by shifting the financial burden to the plan termination insurance program despite the fact that the employer had avaiable [sic] funds to continue funding the plan.

One approach to this problem would be to require financially responsible employer [sic] to, in effect, act as self-insurers for the unfunded vested liabilities and those who are not financially responsible to obtain plan termination insurance. This approach, which is supported by

precdent [sic] in the field of workmen's compensation, for example, was considered and rejected becuase [sic] of the potentially enormous liabilities invoved [sic]. To require the Secretary to evaluate the financial capabilities of particular employers to assume such potentially enormous liabilities might have an adverse effect on the employer's competitive position and on his continued healthy growth.

Having determined that participation in the plan termination insurance program was essential for all plans, and that some degree of employer liability was necessary, the question of the degree of such liability becomes important. The Committee had concern that if the degree of liability was absolute to the extent of the employer's assets, it might drive some employers to the brink of bankruptcy, impose substantial economic hardship, or discourage the establishment of plans or the reasonable liberalization of benefits.

Accordingly, the Committee endorsed a formula of employer liability which requires the employer to reimburse the plan termination insurance program for the total amount of insurance paid, but in no event greater than 50% of employer's net worth at time of plan termination.

In addition, as a result of plan termination field hearings held by the Labor Subcommittee, numerous instances were disclosed where acquiring companies that terminated pension plans failed to take over the liability for vested benefits owed to the employees of the predecessor company. Since this circumstance could also arise in connection with the reinsurance provision, it is necessary to strengthen the reinsurance provisions by requiring successors-in-interest to be liable for reimbursements owed by predecessor companies.

Calendar No. 361

93D CONGRESS, 1st Session } SENATE { REPORT No. 93-383

PRIVATE PENSION PLAN REFORM

REPORT

OF THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

TOGETHER WITH ADDITIONAL AND SUPPLEMENTAL VIEWS

ON

S. 1179

AUGUST 21, 1973.—Ordered to be printed
Filed under authority of the order of the Senate on August 1, 1973

U.S. GOVERNMENT PRINTING OFFICE
20-363 O WASHINGTON : 1973

• • •

Liability of employer.—Concern was expressed to the committee that in the absence of appropriate safeguards under an insurance system, an employer might establish or amend a plan to provide substantial benefits with the realization that its funding may be inadequate to pay the benefits called for. Such an employer might, it was argued, rely on the insurance as the backup which enables it to be more generous in promising pension benefits to meet labor demands than would be the case if it knew that the benefits would have to be paid for entirely out of the assets of the employer. On the other hand, it was clear to the committee that the imposition of heavy obligations on employers would discourage provisions for adequate pension plans.

To deal with these competing considerations, the committee determined to impose on the employer a limited liability to reimburse the insurance system for a portion of the payments that must be made by the insurance Corporation in satisfaction of its obligations if the employer's plan fails. Under the bill (sec. 461 of the bill), the employer generally is to be liable to reimburse the Corporation in an amount equal to the lesser of (1) one-tenth of the insurance Corporation's insurance liabilities on account of the plan failure or (2) one-half of the net worth of the employer.

• • •

Calendar No. 119

93d CONGRESS S. 4
1st SESSION

IN THE SENATE OF THE UNITED STATES

September 17, 1973

Ordered to lie on the table and to be printed

AMENDMENT
(IN THE NATURE OF A SUBSTITUTE)

Intended to be proposed by MR. NELSON (for himself, MR. LONG, MR. BENTSEN, and MR. BENNETT) to S. 4, a bill to strengthen and improve the protections and interests of participants and beneficiaries of employee pension and welfare benefit plans, viz: Strike out all after the enacting clause and insert in lieu thereof the following:

That (a) this Act may be cited as the "Retirement Income Security for Employees Act".

• • •

SEC. 462. LIABILITY OF EMPLOYER

(a) EMPLOYERS LIABLE.—This section applies to any employer who maintained a plan (other than a multiemployer plan) at the time it was terminated by the corporation, but does not apply—

(1) to an employer who maintained a plan with respect to which he paid the annual optional premium described in paragraphs (2)(C) and (3)(B) of section 403(b) for each of the 5 plan years immediately preceding the plan year during which the plan terminated unless the employer remains in business (as defined in subsection (f)), or

(2) to the extent of any liability arising out of the insolvency of a qualified insurance carrier (as defined in section 301(4) of this Act).

(b) AMOUNT OF LIABILITY.—Any employer to which this section applies shall be liable to the Corporation, in an amount equal to the lesser of—

(1) the amount finally determined under section 461, or

(2) 30 percent of the net worth of such employer determined as of the day 120 days prior to the date of termination, without regard to any liability under this section.

[From the Congressional Record—Senate, Sept. 18, 1973]

RETIREMENT INCOME SECURITY FOR EMPLOYEES ACT

* * *

The Senate continued with the consideration of the bill (S. 4) to strengthen and improve the protections and interests of participants and beneficiaries of employee pension and welfare benefit plans.

Mr. NELSON. Mr. President, I ask unanimous consent to have printed in the Record an analysis of the substitute amendment to S. 4, my amendment No. 496.

There being no objection, the analysis was ordered to be printed in the Record, as follows:

* * *

S. 4 provided that insurable benefits could be covered by the insurance upon the effective date of the insurance title (one year after date of enactment of the bill), while S. 1179 would delay coverage for three years after that time in order to enable the insurance fund to be built up by collection of premiums. Under this amendment, all

plans would be covered after two years of premium collections—sooner if the insurance corporation decides before that time that it has enough funds to begin coverage earlier. Generally, premium taxes are to be payable by employers beginning in 1975. Therefore, coverage would generally begin not later than 1977.

A difference existed in the two bills as to the extent of the employer's liability to the insurance corporation to reimburse it for losses caused by its coverage of that employer's terminated plan. Under. S. 4 the liability would have been limited to 50 percent of the employer's net worth. S. 1179 limits liability to the lesser of 50 percent of the net worth or 10 percent of the loss. Under this amendment, the employer's contingent liability is limited to 100 percent of the loss up to 30 percent of his net worth. It is believed that this contingent liability will be sufficient to prevent employers from terminating plans to take advantage of the insurance for themselves and their employees.

This decision also permits the elimination of the "phasing-in" schedule of S. 1179, which would have permitted only gradual coverage of newly created plans and benefits.

93d CONGRESS 1st SESSION — HOUSE OF REPRESENTATIVES — Report No. 93-533

EMPLOYEE BENEFIT SECURITY ACT OF 1973

October 2, 1973.—Committeed [sic] to the Committee of the Whole House on the State of the Union and ordered to be printed

MR. PERKINS, from the Committee on Education and Labor, submitted the following

REPORT

together with

SUPPLEMENTAL, ADDITIONAL, AND INDIVIDUAL VIEWS

[To accompany H.R. 2]

The Committee on Education and Labor, to whom was referred the bill (H.R. 2) to revise the Welfare and Pension Plans Disclosure Act, having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass. The amendment substitutes all after the enacting clause and inserts a substitute text which appears in italic type in the reported bill.

* * *

Section 405.—Recovery

The Committee recognizes that in order to provide adequate protection to employees against loss of vested benefits owing to premature plan termination, it is necessary for the insurance program to cover all forms of plan termination regardless of the circumstances giving rise to the termination. The Committee also recognized that some degree of employer liability was essential where the employer was not insolvent at the point of plan termination in order to preclude abuse by shifting the financial burden to the plan termination insurance program despite the fact that the employer had available funds to continue funding the plan.

One approach to this problem would be to require financially responsible employers to, in effect, act as self-insurers for the unfunded vested liabilities and those who are not financially responsible to obtain plan termination insurance. This approach, which is supported by precedent in the field of workmen's compensation, for example, was considered and rejected because of the

potentially enormous liabilities involved. To require the Secretary to evaluate the financial capabilities of particular employers to assume such potentially enormous liabilities might have an adverse effect on the employer's competitive position and on his continued healthy growth.

Having determined that participation in the plan termination insurance program was essential for all plans, and that some degree of employer liability was necessary, the question of the degree of such liability becomes important. The Committee had concern that if the degree of liability was absolute to the extent of the employer's assets, it might drive some employers to the brink of bankruptcy, impose substantial economic hardship, or discourage the establishment of plans or the reasonable liberalization of benefits.

Accordingly, the Committee endorsed a formula of employer liability which requires the employer to reimburse the plan termination insurance program for the total amount of insurance paid, but in no event greater than 50% of employer's net worth at time of plan termination.

[From the Congressional Record—House, Feb. 28, 1974]

EMPLOYEE BENEFIT SECURITY ACT OF 1973

Mr. DENT. Mr. Speaker, I move that the House resolve itself into the Committee of the Whole House on the State of the Union for the further consideration of this bill (H.R. 2) to revise the Welfare and Pension Plans Disclosure Act.

The motion was agreed to.

• • •

Mr. PRICE of Texas. Mr. Chairman, responsible and comprehensive pension reform is necessary to insure that every American working person covered by a pen-

sion plan can depend upon that plan to pay benefits to which that person is entitled after retirement.

The goals of the legislation before us are to extend pension plan coverage to more working people, to assure employees equitable pension treatment and benefits, and to protect employees from loss of retirement benefits due to risk of bankruptcy, merger, or reasonable job shifts. While we are considering these changes, we must keep in mind that if Federal pension regulations become too burdensome for employers, those employers may be encouraged to choose not to set up a pension plan for their employees. After all, these plans are voluntary, and I would strongly oppose any Federal requirement to provide mandatory pension plans in private business.

We must, therefore, be certain that the legislation we enact will accomplish the goals we desire without rendering harm to working Americans by actually discouraging company pension plans.

• • •

Also, the bill provides for a complicated "plan termination insurance" system which imposes new employer liabilities for unfunded claims on the pension fund of up to "50 percent of the net worth" of the employer. This provision would have a devastating impact on the credit rating of many firms. This is a drastic move which requires more study and I would support reconsideration of this provision of the bill.

• • •

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 2) to provide for pension reform submit the fol-

lowing joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate struck out all of the House bill after the enacting clause and inserted a substitute amendment. The conference has agreed to a substitute for both the Senate amendment and the House bill. The statement following the table of contents explains the principal differences between the substitute agreed to in conference and the House and Senate bills.

• • •

Employer liability

Both the House bill and the Senate amendment required employer liability for insurance payments made by the corporation because of terminations of the employers' plans. The House bill set a limit on employer liability of 50 percent of the employer's net worth, as compared with 30 percent under the Senate amendment. In addition, the House bill did not impose any liability in the case of multiemployer plans.

As previously discussed, both the House bill and the Senate amendment authorized the corporation to insure employers against employer liability, under different sets of conditions.

Under the conference substitute, employer liability is required for employers in both single-employer and multiemployer plans. The employer liability is limited to 30 percent of net worth, with net worth valued as of a date chosen by the corporation, but not more than 120 days prior to the termination.

• • •

[From the Congressional Record—
Senate, Aug. 22, 1974]

• • •

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974—CONFERENCE REPORT

Mr. WILLIAMS. Mr. President, I submit a report of the committee of conference on H.R. 2, and ask for its immediate consideration.

• • •

Mr. WILLIAMS. Mr. President, I am happy to report that after long and numerous meetings of the conferees on H.R. 2, we are able to bring before the Senate a conference agreement which has been unanimously adopted, and which, for the first time, will safeguard the pension expectations of American workers.

• • •

TERMINATION INSURANCE

• • •

Since there would be a possibility of abuse by solvent employers who terminate a plan and shift the financial burden to the insurance program, notwithstanding their own financial ability to continue funding the plan, the conference bill imposes liability on employers whose plans terminate, to reimburse the program for benefits paid by the corporation. This liability extends to 30 percent of the employer's net worth. However, the bill does provide that employers will be permitted to exercise an option to obtain additional insurance to cover such contingent liability.

J LABOR AGREEMENT

AGREEMENT ENTERED INTO

BETWEEN

HEPPENSTALL COMPANY

AND

UNITED STEELWORKERS OF AMERICA

THIS AGREEMENT, dated August 25, 1975, is by and between the HEPPENSTALL COMPANY, for its plant located at Pittsburgh, Pennsylvania, or its successor or successors, (hereinafter referred to as the "Company") and the UNITED STEELWORKERS OF AMERICA, or its successor or successors (hereinafter referred to as the "Union"). Any agreement, whether written or oral, which is not set forth in this Agreement or as a Supplemental Letter of Intent thereto, shall be null and void and of no further force and effect on and after August 25, 1975.

SECTION I

INTENT AND PURPOSE

The purpose of the Company and the Union in entering into this labor contract is to set forth their agreement on rates of pay, hours of work, and other conditions of employment so as to promote orderly and peaceful relations with the employees and to achieve uninterrupted operations in the plants.

* * *

SECTION VI

ADJUSTMENT OF GRIEVANCES

PURPOSE

The provisions of this Agreement constitute the sole procedure for the processing and settlement of any claim by an employee or the Union of violation by the Company of this Agreement. As representative of the employees, the Union may process grievances through the grievance procedure, including arbitration in accordance with the Agreement or adjust or settle same. The procedures under this article are available to the Union or the Company for the presentation and settlement of grievances arising under the terms of this Agreement. Any grievance initiated by the Company shall be introduced in Step 2 of the Grievance Procedure. Should differences arise between the Company and the Union as to the interpretation of, application of, or compliance with, the specific provisions of this Agreement, or as to any question in relation to wages, hours of work, or other working conditions of any employee, there shall be no slowdowns, interruptions or impeding of work, work stoppages, strikes or walkouts on account of such difference, but an earnest effort shall be made to settle such differences in the following manner.

* * *

ARBITRATION

Except as otherwise provided in this Agreement and subject to the limitations contained in this Agreement, if the grievance is not settled under the foregoing procedure, then, the International Representative may, within ten (10) calendar days after the receipt of the Step 3 answer, request in writing that the matter be submitted to arbitration. Within three (3) days after notification has been received, that the answer in the 3rd Step is not

satisfactory, a meeting will be held to select an arbitrator. In the event that the International Union and the Company are unable to agree on an impartial arbitrator within fifteen (15) days from the receipt of the request for arbitration, the parties shall request the Federal Mediation and Conciliation Service, to submit a list of seven (7) recognized arbitrators. The Company shall remove three (3) names and the Union shall remove three (3) names and the remaining individual not so stricken shall be the arbitrator. The arbitrator's decision shall be final and binding on both parties. The compensation and expenses of the arbitration shall be borne equally by the Company and the Union.

• • •

HEPPENSTALL COMPANY

MEMORANDUM OF UNDERSTANDING

RE: PENSIONS

The Company agrees to the following changes which will be made in the pension benefits effective on the dates shown.

1. Effective August 16, 1976 pensions shall become vested after 10 years of continuous service for employees terminating on or after that date.

[changes 2-9 omitted]

• • •

K PENSION AGREEMENT

AGREEMENT dated (effective August 16, 1976 between HEPPENSTALL COMPANY, or its successors (hereinafter referred to as the "Company") and UNITED STEELWORKERS OF AMERICA, or its successors (hereinafter referred to as the "Union").

SECTION 1. INTRODUCTION

DEFINITIONS

1.1 Wherever used herein

(a) "Basic Agreement" means the labor agreement between the Company and the Union (applicable to the hourly rated production and maintenance employees at the Pittsburgh, Pennsylvania plant, or any successor agreement between the Company and the Union which is, during the life of this Pension Agreement, applicable to such employees;

• • •

(c) "participant" means any Employee who shall have had at least one year of continuous service and shall have attained the age of 25 years and who, from time to time during the period in which this Agreement is effective, is accruing continuous service; where so indicated in the context, "participant" also refers to a person who is no longer accruing continuous service but who had attained pension eligibility under this Agreement at the date he ceased to accrue continuous service, including a person who is retired and is receiving or is entitled to receive pension benefits under this Agreement;

• • •

(e) "Company" means the Heppenstall Company and covers the plant located at Pittsburgh, Pennsylvania

• • •

PROVISION OF BENEFITS:

1.3 Subject to the corporate action required to provide the pension benefits and to the Company's obtaining and/or retaining approval by the Commissioner of Internal Revenue of the trust or trusts heretofore or hereafter established under the pension plan of the Company as changed to provide the pension benefits set forth in this Agreement, as exempt under the applicable provisions of the Internal Revenue Code or successors to them, the following pension benefits shall be provided by the Company or caused to be provided by the Company for the participants.

• • •

SECTION 8. PENSION TRUST

8.1 For the purpose of supplying the pension benefits herein provided, the Company may establish or cause to be established, a pension trust or trusts or may utilize any existing trust or trusts heretofore established by or on behalf of the Company. The Company is free to determine the manner and means of making provision for funding and paying the pension benefits set forth in this Agreement.

• • •

SECTION 10. GENERAL PROVISIONS

• • •

CONTINUATION OF BENEFIT

10.2 Any benefit properly payable pursuant to this Agreement shall continue to be payable, notwithstanding the termination or expiration of this Agreement.

• • •

L AMENDMENT TO PENSION AGREEMENT

PENSION AGREEMENT

AGREEMENT dated (effective August 16, 1976) between Heppenstall Company, or its successors (hereinafter referred to as the "Company") and United Steelworkers of America, or its successors (hereinafter referred to as the "Union").

As the IRS has required that certain revisions be made to that certain Pension Agreement made and entered into in September, 1977, and made effective as of August 16, 1976, by and between the Union and the Company to assure that the terms of the said Pension Agreement satisfy the requirements of the Internal Revenue Code, the Union and the Company agree that the said Pension Agreement be revised as follows:

* * *

5. Section 10 of the said Pension Agreement is hereby amended to add a new sentence to paragraph 10.2 at the end thereof which reads as follows:

In the event that this Agreement is terminated, in whole or in part, the rights of any participant with respect to whom such termination shall have occurred shall, from the date of such termination or partial termination, be fully vested and non-forfeitable, subject to divestment by reason of death or operation of law, in the benefits established under the Agreement as of the date such termination or partial termination is effective to the extent those benefits are funded by the applicable assets of the trust fund, as determined in accordance with the terms of the trust or trusts established by the Company in accordance with the provisions of Section 8 of this Agreement.

* * *

No. 80-1909

Office-Supreme Court, U.S.
FILED
AUG 6 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1980

THE HEPPENSTALL COMPANY,
Petitioner,

vs.

WILLIAM A. MURPHY, MARVIN PEASE, WILLIAM ROGERS, EDWARD BANACHOSKI, ALBERT BETTS, WILLIAM FAHERTY, ALBERT CHRISTMAN, ROMAN KRYSINSKI, CHARLES MANJEROVIC, WALTER REGAN, JOHN AUSTIN, JR., FRANK CONIGLIO, FRANK KUSH, LAWRENCE WIESEN, JOHN CHMILL AND SIDNEY ROBINSON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1090

THE HEPPENSTALL COMPANY,

Petitioner,

vs.

WILLIAM A. MURPHY, MARVIN PEASE, WILLIAM ROGERS, EDWARD BANACHOSKI, ALBERT BETTS, WILLIAM FAHERTY, ALBERT CHRISTMAN, ROMAN KRYSINSKI, CHARLES MANJEROVIC, WALTER REGAN, JOHN AUSTIN, JR., FRANK CONIGLIO, FRANK KUSH, LAWRENCE WIESEN, JOHN CHMILL AND SIDNEY ROBINSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN OPPOSITION

ERISA was enacted to protect employee pension expectations. Petitioner contends it also dismantled the only buttress upholding those expectations before the Act's passage, the direct liability that some employers had pledged to provide pension benefits.

1. Before the decision below, no other circuit court had considered the enforceability, under ERISA, of the direct liability which an employer had voluntarily assumed, or collectively bargained, to provide pension benefits.[1] The issue's rarity was predictable. An employer retains the obligation to provide benefits because it believes that employees should receive the pension benefits it has promised them. It is not likely to evade that obligation through litigation. This fact alone lessens the chance that the issue will arise with any frequency. If we overestimate employers' intentions and another, besides petitioner, disavows the liability it had assumed, then this Court will again have the opportunity to weigh the contention that ERISA extinguishes its obligations under a plan.

2. While the issue raised is of consequence to the thousands of employees who enjoy the benefits their employers guarantee, it is also one of obvious resolution. It is the resolution which the statute's language and purpose, and this Court's analysis in *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359 (1980)[2] compel. The Third Circuit adopted this resolution when it held that ERISA authorizes the enforcement of an employer's direct liability. Thus, the petition presents no substantial issue worthy of this court's review.

Introduction

As this court has noted, a defined benefit plan like petitioner's is one "under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide

[1] The question did arise in two bankruptcy proceedings. *In re Alan Wood Steel Co.*, 212 BNA Pension Reporter, D-1 (E.D. Pa. 1978); *In the matter of M & M Transportation Company*, 228 BNA Bankruptcy Reporter, D-4 (S.D. N.Y. 1980). Both reached the same result as did the Circuit Court here.

[2] Hereinafter "*Nachman*."

those benefits." *Alabama Power Co. v. Davis*, 431 U.S. 581, 593, n.18 (1977). We will distinguish between two types of defined benefit plans: those in which the employer retains direct liability to provide benefits and those in which it disclaims liability.[3] While employers typically adopt disclaimers,[4] a sizable number retain direct liability.[5]

The extent of an employer's liability obviously affects employees' security in their pension expectations. Only employer insolvency threatens the receipt of benefits for which an employer is directly liable. *Nachman*, 446 U.S. at 379. Where the employer disclaims liability, however, the receipt of benefits ultimately depends upon its continued willingness to fund the plan. If that willingness ends while accrued pension liabilities exceed accumulated contributions, participants' benefits are reduced or eliminated and their expectations go unfulfilled.

The prevalence of liability disclaimers, which employers invoked in terminating plans, had a

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[3] The employer typically effects the disclaimer through a series of plan provisions. These establish a pension fund, require employer contributions to the fund, absolve the employer of any responsibility other than making contributions, permit employer termination of the plan and discontinuance of contributions, and specify that participants may look only to the fund, and not to the employer, for the payments promised under the plan. *See* D. McGill, *Fundamentals of Private Pensions*, 158-9 (3rd Ed. 1975). The attraction of a disclaimer is obvious, since it offers a control upon costs of otherwise "unknown magnitude and indeterminate duration." D. McGill, *Fundamentals of Private Pensions*, 103 (2d Ed. 1964) ERISA authorizes employers to include such disclaimers in their plans. *Nachman*, 346 U.S. at 385, n.35.

[4] *Nachman*, 446 U.S. at 378.

[5] *See, e.g.*, D. McGill, *Employer Guarantee of Pension Benefits*, 21-38, 39 (1974). In the steel industry such guarantees are found in plans covering hundreds of thousands of participants. *See, e.g.*, Prentice—Hall, *Pension and Profit Sharing Forms*, ¶51,104.

"disastrous effect"[6] on participants and spurred ERISA's enactment. *Nachman*, 446 U.S. at 378-79, n.28, 29 U.S.C. §1001(a). ERISA offered two responses. As a preventive measure, it imposed *minimum* requirements to foster sounder funding of plans. §§2(a), 2(c) and 302, 29 U.S.C. 1001(a), 1001(c) and 1082. These requirements did not eliminate the possibility of plans terminating without adequate funding. Thus, as a remedial measure, ERISA created a termination insurance scheme under which the Pension Benefit Guaranty Corporation ("PBGC") provides some of the benefits of a terminated, underfunded plan. §§2(a), 2(c) and 4001 *ff*, 29 U.S.C. §§1001(a), 1001(c) and 1301ff.[7] Remarks by Senator Bentsen, II Leg. Hist. 1637.[8]

This background, which *Nachman* recited, aids in appreciating the Circuit's faithfulness to that decision and the utter accuracy of its conclusion that "nothing in ERISA, nor in its legislative history . . . discountenances direct contractual recovery of pension benefits from the employer."

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[6] Remarks by Senator Curtis in II Legislative History of Employee Retirement and Income Security Act of 1974 at 1649 (Hereinafter "Leg. Hist.").

[7] The guarantee covers only basic benefits, as defined in §4022, 29 U.S.C. §1322. Among the benefits the definition excludes are fixed dollar supplements to employees not yet eligible for social security benefits, 29 CFR §2605.4(a)(1), and full benefits derived from plan amendments adopted in the five years before termination. 29 U.S.C. §1322. Under the petitioner's interpretation of the statute, a participant could never enforce plan terms providing non-basic benefits.

[8] Congress perceived another problem affecting the nation's private pension system: the absence of adequate state and federal remedies to safeguard "the security of anticipated benefit rights in private plans." S. Rep. No. 93-127, 93d Cong., 1st Sess. at 5, I Leg. Hist. 591. Thus, in enacting ERISA Congress determined to provide "appropriate remedies, sanctions, and ready access to the Federal Courts." ERISA §2(b); 29 U.S.C. §1001(b); See, also, Senate Report 93-127, 93d Cong., 1st Sess., 35, I Leg. Hist. 621.

I. ERISA Authorizes Direct Employer Liability.

Nachman accepted as given that ERISA authorized an employer's direct liability for pension benefits.[9] It stated that an "employee could sue the employer directly" upon such liability. 446 U.S. at 379, n.29. It reasoned that the ERISA's limitation on employer's liability to the PBGC for unfunded, basic benefits could not assist the directly liable employer since the limitation "would not be applicable to protect the employer in lawsuits brought directly against it." 446 U.S. at 385, n.37.[10]

Nachman could accept the postulate on which its analysis rested since direct liability furthered so many of ERISA's legislative purposes. The employer guarantee of benefits, while not required by ERISA, still fosters "the equitable character of such plans and their financial soundness." §2(a); 29 U.S.C. 1001(a). It also "encourage[s] the continuation and maintenance of voluntary private pension plans for the benefit of their participants." §4002(a)(1); 29 U.S.C. §1302(a)(1). Finally, it makes more likely "the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans." §4002(a)(2); 29 U.S.C. §1302(a)(2). As *Nachman* noted, Congress recognized that plan terminations, and the resulting benefit reductions,

[9] This Court is not alone in assuming that post-ERISA guarantees remain valid and enforceable. Professor McGill, a noted commentator on pension matters, endorsed the concept of direct liability shortly after ERISA's enactment. D. McGill, *Employer Guarantee of Pension Benefits*, 7-8 (1974).

[10] *Nachman* evaluated the post-ERISA validity of disclaimers at length and concluded ERISA permitted disclaimers since their prohibition would hamper the very growth of pension plans which Congress desired. 446 U.S. at 385, n.35. Such disclaimers would have no nuturing effect, however, if ERISA precluded direct liability. In that case, as the Third Circuit noted, "*Nachman* would nonsensically permit restrictions on a form of liability the statute had precluded." (Pet. App. 13a).

stemmed largely from "the absence of any direct guarantee by the employer" in the typical plan. 446 U.S. at 378-79, n.28. *Nachman* had no reason to believe that Congress had banned the only protection against benefit reductions which predated ERISA.

Nachman answers petitioner's wholly frivolous argument that §411(d)(3) of the Internal Revenue Code, 29 U.S.C. §411(d)(3), requires that terminated plans vest only funded benefits.[11] There the court took note of ERISA's minimum vesting requirements, the more important being those of §203(a)(2) which mandate vesting at given years of service. 29 U.S.C. §1053(a)(2). Both the majority and the dissenters agreed that ERISA would invalidate any plan provision under which participants would forfeit unfunded benefits vesting under these standards. 446 U.S. at 366, n.10; and *id.* at 390, n.8 (dissent).[12]

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[11] Petitioner never expressly identifies which of ERISA's provisions requires disclaimers. It does, however, style plan Section 10.2 as its disclaimer (Pet. at 11) and contend that this section was adopted in order to comply with Code §411(d)(3). (Pet. at 9). From this we infer it views §411(d)(3) as the provision which requires disclaimers and bans direct liability.

[12] Totally aside from *Nachman*, this argument would fail. §411(d)(3) conformed to ERISA the longstanding requirement of §401(a)(7) Pub. Law 87792, that accrued benefits vest on termination to the extent they are funded. Petitioner cannot argue that §401(a)(7) required disclaimers or precluded direct liability since the pre-ERISA tax regulations clearly recognize disclaimers as permissible, not mandatory. Tres. Regs. 1-401-2(b)(2); 1-401-1(b)(2) (1956). What is more, petitioner's interpretation of §411(d)(3) would lead to the absured conclusion that the PBGC insures no benefits. With certain irrelevant exceptions, the PBGC guarantees:

> "all non-forfeitable benefits (other than those becoming non-forfeitable solely on account of the termination of a plan.) . . . ." ERISA §4022, 29 U.S.C. §1322.

If, as petitioner must argue, §411(d)(3) required the forfeiture of otherwise vested benefits, then §4022, which itself excludes §411(d)(3) benefits, would define the null set. Obviously, two classes of vested benefits exist at termination: those gained under the normal vesting schedule and those which, under §411(d)(3), vest solely on account of the plan's termination.

Petitioner also argues that ERISA's funding requirements prohibit direct liability. These requirements are minima, however, which employers may freely exceed.[13] Analogously, while it must always meet the funding requirements, the employer can volunteer additional security for benefits, such as its direct liability. In doing so, it furthers one of ERISA's chief goals: assuring to participants the receipt of their promised benefits. *Nachman*, 446 U.S. at 375.

Petitioner finally contends that ERISA limits an employer's liability to those amounts the PBGC may collect for unfunded, insured benefits under §4062. 29 U.S.C. 1362(a). The argument does not rely on the provision's language, which simply sets out the liability to the PBGC and says nothing about liability to participants. Rather, petitioner mines the legislative history and there discovers the Congressional concern that imposing unlimited liability on employers might retard growth of the nation's pension system. *Nachman*, 446 U.S. at 379-80, n.30.[14]

While Congress chose not to impose direct liability, nothing in the legislative history reflects a concern over an employer's voluntarily assuming that liability. Allowing that assumption would not deter the growth of plans since employers remain free to limit their liability. *Nachman*, 446 U.S. at 385, n.35. But the employer can also, either unilaterally or through collective bargaining, exercise the freedom ERISA affords to "work out the pension programs best suited"[15] to its

[13] Conference Report, III Leg. Hist. at 4550; Remarks of Senator Bentsen, III Leg. Hist. at 4791.

[14] See, S. Rep. No. 93-383, 93d Cong. 1st Sess. 87, I Leg. Hist. 1155; H. Rep. No. 93-533, 93d Cong. 1st Sess. 16, II Leg. Hist. at 2363.

[15] Remarks of Sen. Bentsen, II Leg. Hist. 1637.

needs and retain direct liability. That exercise promotes both the growth of plans and the security of their benefits.

II. ERISA Provides An Action To Enforce An Employer's Liability.

Petitioner also contends that ERISA provides no action against an employer on his liability under a plan. Were this interpretation correct, ERISA's sanction of direct liability would be inconsequential since participants could not enforce it.[16] But ERISA does not deny participants this remedy.

Nachman repeatedly noted that participants could enforce an employer's direct liability. The court emphasized that the post-ERISA utility of disclaimers lies in "protect[ing] the employer in lawsuits by employees brought directly against it." 446 U.S. at 385, n.37. It appreciated that the PBGC could not stop employees from suing the employer directly on his liability. *Id.* at 383.

Nachman accurately reflects the breadth of the ERISA action. ERISA Section 502 authorizes a participant to bring suits "to recover benefits due him under the terms of his plan" and to "enjoin any act . . . which violates . . . the terms of the plan or . . . to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce . . . the terms of the plan." §502(a)(1)(B) and (3); 29 U.S.C. §1132(a)(1)(B) and (3). If direct liability is among

[16] ERISA preempts state law. ERISA §514(a); 29 U.S.C. §1144(a). While it permits certain actions in state courts, these can be no broader than those over which the federal courts have concurrent jurisdiction. ERISA §502(e)(1); 29 U.S.C. §1132(e)(1). Thus, if there is no federal remedy against an employer who violates his guarantee, there is no remedy at all.

the plan's terms, a participant may enforce it pursuant to Section 502.[17]

While it authorizes suits against plans as entities,[18] Section 502 has a broader reach.[19] It accomplishes ERISA's goal of providing "ready access to the courts." §2(a); 29 U.S.C. §1001(a). Participant actions against employers are necessary to ERISA's effectiveness. Only employers, not the plan, can answer an action for inadequate funding. Similarly, only employers can discharge the liability that a provision for direct liability imposes.

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[17] Petitioner's collectively bargained plan states that its benefits "shall be provided or caused to be provided by the Company." Pet. App. at 6a. Petitioner contends that it circumscribed this direct, unconditional liability when, at the request of the IRS, it amended Section 10.2 of the plan. *Id.* at 76a. The amendment tracks the language of Code §411(d)(3) and vests accrued, funded benefits at termination. It is only a vesting provision whose scope it measures by reference, to funding. It is not the only vesting provision, however ERISA would invalidate any attempt to limit vesting to funded benefits. *Nachman*, 446 U.S. at 336, n.102.

[18] §502(d)(1); 29 U.S.C. §1132(d)(1).

[19] If, as petitioner contends, Section 502 authorized actions against plans alone, then Congress would not have provided that a judgment "under this title against an employee benefit plan shall be enforceable only against the plan." §502(d)(2); 29 U.S.C. §1132(d)(2). Such judgments would necessarily be against the plan.

The lower courts have construed Section 502(a) as providing a direct action against employers in a number of situations. *See, e.g., Dependahl v. Falstaff Brewing Corp.*, 491 F. Supp. 1188 (E.D. Mo. 1980) (enforcing employer's direct liability under a benefit plan); *Bittner v. Sadoff & Rudoy Industries*, 490 F. Supp. 534 (E.D. Wis. 1980) (employer liability for discrimination); *Huge v. Old Home Manor, Inc.*, 419 F. Supp. 1019 (W.D. Pa. 1976) (employer liability for contributions). No decision holds that Section 502(a) excludes actions on an employer's individual liability. Of course, some courts have denied recovery against employers where plaintiffs fail to state a claim. *See, e.g.*, cases cited in Pet. at 15, n.26.

III. The Plan's Arbitration Clause Does Not Govern A Dispute Over The Enforceability Of The Employer's Direct Liability.

The Third Circuit held that a retiree's dispute over his employer's direct liability falls outside the plan's provision[20] for arbitration of applicant's claims for benefits. The Circuit soundly reasoned that retirees are not applicants and that the validity of the employer's guarantee does not involve the amount of or right to a benefit. Thus, the plan's arbitration clause did not apply.[21]

Despite petitioner's contrary assertion, the circuit did not "refus[e] to enforce the arbitration clause." Pet. at 22. Its comprehensive analysis of the provision's scope is ample evidence that the circuit presupposed the enforceability of the clause.[22] Thus, there is no conflict between the decision below and those of other circuits which have enforced provisions for arbitrating pension disputes.[23]

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[20] Pet. App. at 6a. Petitioner did not claim before the Circuit Court that the arbitration provisions of the collective bargaining agreement applied to this dispute.

[21] We do not understand petitioner to argue that a mis-interpretation of this particular clause would present an important issue of federal law warranting review here.

[22] Respondents had argued that retirees are not required to exhaust such procedures in Section 502 actions, an argument the circuit found unnecessary to address.

[23] *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980); *Challenger v. Local Union No. 1, Ironworkers*, 619 F.2d 645 (7th Cir. 1980).

Conclusion

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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THE HEPPENSTALL COMPANY,
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Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Argument in Reply

Respondents' brief in opposition, received August 7, 1981, places its principal reliance on *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980), without even attempting to answer petitioner's argument (petition, pp. 17-19) explaining how the opinion in that case, dealing with a pre-ERISA plan, is inapplicable to the post-ERISA plan of the present case. Respondents also rely (brief, p. 2, fn. 1) on *In re Alan Wood Steel Co.*, 212 BNA Pension Reporter D-1 (E.D. Pa. 1978), and on *In the Matter of M & M Transportation Company*, 288 BNA Bankruptcy Reporter D-4 (S.D.N.Y. 1980), without attempting to answer petitioner's arguments as to them (petition, pp. 14-15).

The *Nachman* case is not authority to permit an employee to bring a direct action against his employer for benefits allegedly due him under a pension benefit plan covered by ERISA. ERISA provided that employees' rights under such a pension plan would be guaranteed by the Pension Benefit Guaranty Corporation (PBGC). PBGC does not guarantee pay-as-you-go plans (petition, p.12). It guarantees only I.R.S.-approved plans complying with the requirements of ERISA, including ERISA's funding requirements.[1]

Plaintiffs at bar are attempting to argue that the same clause of their collective bargaining agreement with petitioner gave them not only a funded plan covered by ERISA with payments guaranteed by PBGC, but also an unfunded plan not covered by ERISA with enforce-

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1. For discussion of unfunded plans, see Exempt Compensation Arrangements under ERISA, 28 Cath. U. L. Rev. 445 (1979).

ment rights directly against their employer under ERISA.[2] Their present claim is on the latter, which they are seeking to enforce in a common law action of indebitatus assumpsit. The courts below held that they could recover directly from their employer on this claim.

A funded plan guaranteed by PBGC cannot at the same time be a pay-as-you-go plan on which the employees can recover directly against their employer. The agreement in the case at bar clearly created a pension benefit plan governed by ERISA and guaranteed by PBGC. It cannot at the same time be an unfunded plan not covered by ERISA. The common law action of indebitatus assumpsit was one of the theories employed to enforce rights under state contract law applicable to pension plans prior to ERISA. Such rights have now been preempted by ERISA: *Alessi v. Raybestos-Manhattan, Inc.*, 68 L.Ed.2d 402 (1981). Therefore no common law rights remain to be enforced by employees against their employer. Their only rights are against the plan or its insurer, PBGC, under ERISA.

The Court of Appeals held petitioner directly liable to its employees, despite the Court's conclusion that a limitation of benefit recovery clause was extant (5a), because of the Court's belief that the employer could fund the pension plan to whatever extent it wished. If the employer could exercise complete discretion as to the funding *vel non* of the plan, and the limitation of recovery clause restricted the money the participants could receive to that in the pension plan's trust, then participants would have fully vested rights in scant benefits.

---

2. Plaintiffs are forced into the inconsistent position of suing under ERISA on a plan not covered by ERISA, because without ERISA the federal district court had no jurisdiction, there being no diversity of citizenship between plaintiffs and their employer.

(5a) Because participants' rights under the plan and its trust were of little value, participants must be able to recover, under the collective bargaining agreement, directly from the employer. (5a) This was the reasoning of the Court of Appeals.

The essential flaw in the Court of Appeals' reasoning was their failure to recognize that funding requirements were imposed on the employer by sections 3(31), 301(a) and 302 of ERISA (29 U.S.C. §§ 1002(31), 1081(a), 1082)), regardless of the pension agreement's provisions on the matter or lack of them. The Heppenstall Company pension plan could not have secured and maintained I.R.S. approval unless it was funded.[3] The employer could exercise discretion to exceed the statutory minimum imposed by ERISA and the Internal Revenue Code (the minimum funding standard account) if it wished, but would be penalized if it did not at least satisfy the statutory minimum. I.R.C. § 4971, 26 U.S.C. § 4971.

The situation the Court of Appeals found unacceptable—the right to recover pension benefits from a trust of little value—was exactly what Congress intended to eliminate when it enacted ERISA. The minimum funding requirements imposed by ERISA and the Internal Revenue Code accomplished this result. There is therefore no need to hold the employer liable to participants for their benefits, because the participants already have, under ERISA, their right to be paid by the plan's insurer—the PBGC.

Respondents argue (brief, pp. 1, 5, 9) that the purpose of ERISA was to ensure that pensioners would receive their pensions, and that this purpose is best carried

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3. Internal Revenue Code § 412, 26 U.S.C. § 412; I.R.S. Pub. 778 (2-72) part 2(b) (53a); Rev. Rul. 71-91, 1971-1 C.B. 116 (52a).

out by imposing on their employers direct liability to make payments to the pensioners. Indeed, respondents say (brief, pp. 2, 6) that such liability was "the only buttress upholding [the pensioners'] expectations before the Act's passage." Respondents completely ignore the undisputed legislative history of what brought about the Act's passage: that employers previously disclaimed *all* liability for unfunded benefits, and that the Act made them responsible for part of them—30 percent (petition, p. 16). Respondents also ignore the statement of Mr. Justice Stevens in the *Nachman* case (petition, p. 18) that if the employer were directly liable to the employees for any funding deficiencies, the Act's provisions making the employer liable for only part of them (30%) would serve no useful purpose.

Respondents state (brief, p. 3) that "a sizeable number [of employers] retain direct liability" in their pension plans, and (fn. 5) that "In the steel industry such guarantees are found in plans covering hundreds of thousands of participants," citing Prentice-Hall, Pension and Profit Sharing Forms, ¶ 51,104. Paragraph 51,104 proves no such thing. It simply sets forth a form of clause identical to the clause in the Heppenstall collective bargaining agreement, section 1.3 (petition, appendix A, p. 6a).

Respondents argue (brief, p. 5, fn. 9) that "Professor McGill, a noted commentator on pension matters, endorsed the concept of direct liability shortly after ERISA's enactment. D. McGill, Employer Guarantee of Pension Benefits, 7-8 (1974)." Professor McGill endorsed no such thing. He said (p. 8), before the enactment of ERISA, only that "employers *should consider* the feasibility and desirability of making accrued pension benefits a claim against their corporate assets to the extent that the assets in the plan are insufficient to satisfy all such

claims." (emphasis supplied). In the preface to this work (pp. ix-x) he recognized the danger of imposing full liability on the employers, and in his concluding observations (p. 39) he flatly stated (p. 40) that the corporate liability imposed by ERISA "is limited to 30 percent of the firm's net worth."[4]

Respondent asserts (p. 6, fn. 12) that petitioners' argument requires the forfeiture of otherwise vested benefits. In this respondent is mistaken. Petitioners argue, not that vested benefits are forfeited, but that ERISA provides, upon termination of a plan, that pensioners' recovery shall be limited to the assets of the plan, which could be less than 100% of the vested benefits. Cf. Treas. Reg. 1.411(a)-4(a). Their vested rights are not forfeited. This is in accordance with *Nachman* (446 U.S. at p. 372).

Respondents argue (brief, p. 9, fn. 17) that the amendment which the Internal Revenue Code (§ 411(d)(3)) required to be made to the pension agreement (76a), was "only a vesting provision whose scope it measures by reference to funding." Respondents thus agree that benefits which were unfunded at the time of termination were not vested. Unvested rights being cut off by the termination, respondents have no claim for them against anyone.

Respondents argue (brief, p. 9, fn. 19) that section 502(a) of ERISA (29 U.S.C. § 1132(a)) has been construed by the lower courts "as providing a direct action

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4. See also Professor McGill's analysis of ERISA in Fundamentals of Private Pensions, 3rd edition (1975), where he discusses (p. 456) the employer's obligation, when the termination of a plan is imminent, to reflect its formerly contingent liability for unfunded benefits up to 30 percent of its net worth on its balance sheet. If the employer were also directly liable to its employees for additional sums, that liability would also have to be reflected on the balance sheet. Yet Professor McGill did not mention this.

against employers in a number of situations," citing three federal district court cases. None of them provided a direct action in the situation presently before the Court. In the first, *Dependahl v. Falstaff Brewing Corp.*, 491 F.Supp. 1188 (E.D. Mo. 1980), plaintiffs sued their employer, not to recover benefits under the plan, but for declaratory and injunctive relief to retain their rights under an employee welfare benefit plan of which their employer sought to deprive them by unjustifiably terminating their employment for the sole purpose of cutting off vested benefits.[5]

The same is true of the second district court case cited by respondents, *Bittner v. Sadoff & Rudoy Industries*, 490 F.Supp. 534 (E.D. Wis. 1980), an employee's action against his employer for damages for retaliatory firing in violation of section 510 of ERISA (29 U.S.C. § 1140). The district court agreed with defendant employer's contention that "the statute only provides for equitable remedies," and held that pursuant to its equitable power "to put plaintiff back into the position he enjoyed before the discharge," it could also award damages (490 F.Supp. at p. 536). This was in accordance with classic equity practice: once a court of equity has assumed jurisdiction, it will grant complete relief, including a judgment for money damages: *Stryjewski v. Local Union No. 830*, 451 Pa. 550, 304 A.2d 463 (1973); *Cambist Films, Inc. v. Duggan*, 475 F.2d 887, 890 (3d Cir. 1973).

In the third district court case cited by respondents, *Huge v. Old Home Manor*, 419 F.Supp. 1019 (W.D. Pa.

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5. Their suit against their employer was not one by a participant "to recover benefits due to him under the terms of his plan" (ERISA, section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)), but "to clarify his rights to future benefits in the plan and to enjoin any act which violates any terms of ERISA or the plan": 491 F.Supp. at p. 1196.

1976), plaintiffs were not employees but the trustees of the United Mine Workers' Health and Retirement Trusts, suing to force an employer to pay agreed-upon contributions into the pension trust.

Respondents' final argument (brief, p. 10) is that there is no conflict between the decision of the courts below refusing to enforce the arbitration clause of the collective bargaining agreement and the decisions of other circuits which have enforced provisions for arbitrating pension disputes, citing *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980), and *Challenger v. Local U. No. 1 of Intern. Bridge*, 619 F.2d 645 (7th Cir. 1980). The exact opposite is true. In both those cases the employee's complaint was dismissed because of his failure to exhaust his administrative remedies before bringing suit. Those decisions support petitioner and squarely conflict with that of the courts below in the case at bar, where the employees' complaint was not dismissed despite their failure to exhaust their administrative remedies.

The position of Respondent throughout its brief clearly demonstrates the fundamental problem of confusion engendered by this case since its inception. In order to maintain Respondent's position, it would be necessary to find, as did the Court of Appeals, the existence of a "plan, fund or program" as a contract which provided for "retirement income to employees", but which is not covered by ERISA. In addition, it would be necessary to find this separate and independent "plan, fund or program" within the four corners of the same document which creates a "plan, fund or program" that is subject to ERISA and that was terminated by action of PBGC, an act of termination confirmed by the same Court of Appeals: *Pension Benefit Guaranty Corp. v. Heppenstall Co.*, 633 F.2d 293 (3d Cir. 1980). It would

also be necessary to find that the "plan, fund or program" as a contract which is not covered by ERISA nevertheless is covered by ERISA insofar as enforcement of employee rights is concerned. Respondent also asks the Court to accept that there can exist in the same document a "plan, fund or program" which does not have to be funded because it is not subject to ERISA, and at the same time funded because it is subject to ERISA; which has benefits covered by Title IV of ERISA but the same benefits are not covered by Title IV of ERISA; whose assets must be held in trust and whose assets need not be held in trust, and containing a limitation of benefit clause that is at the same time both effective and ineffective as to the same benefit, with all of these elements being conditioned for their existence upon this "plan, fund or program" contract's meeting the requirements of the Internal Revenue Code as a qualified plan. Such a maze of inconsistencies surely cannot have been intended by Congress as a statutory solution to achieve uniformity.

Respectfully submitted,

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No. 80-1909

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE HEPPENSTALL COMPANY, PETITIONER

v.

WILLIAM A. MURPHY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether petitioner's employees may recover pension benefits from petitioner after its pension plan has been terminated, where petitioner had promised such benefits in a collective bargaining agreement and had not disclaimed its direct liability for the benefits, even though the enforcement of such direct liability may cause petitioner's total payments to exceed the limitation of 30% of its net worth on its statutory obligation to the Pension Benefit Guaranty Corporation under the Employee Retirement Income Security Act.

2. Whether petitioner's employees were required to submit their pension claims against petitioner for pension benefits to arbitration under the provisions of a collective bargaining agreement that required arbitration of pension disputes only with respect to a participant's eligibility for a pension or the amount of his pension.

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WILLIAM A. MURPHY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the district court is reported at 473 F. Supp. 783 (Pet. App. 14a-18a). The opinion of the court of appeals is reported at 635 F. 2d 233 (Pet. App. 1a-13a).

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1980 (Pet. App. 24a-25a). A petition for rehearing was denied on January 9, 1981 (Pet. App. 26a-27a). By order dated March 24, 1981, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including May 8, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is a private action brought by 16 retired employees of petitioner, The Heppenstall Company, to recover unpaid pension benefits directly from their employer, following the involuntary termination of a pension plan maintained by petitioner pursuant to a collective bargaining agreement (Pet. App. 2a-3a). Prior to its termination, petitioner's pension plan was a qualified plan covered by the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 *et seq.* (ERISA).[1] As the sponsoring employer, petitioner made contributions to the plan from 1950 through 1976. In August 1977, petitioner notified the Pension Benefit Guaranty Corporation (PBGC) it would be unable to make sufficient contributions to the plan to meet the minimum funding standards prescribed by ERISA because it was experiencing temporary cash problems. Subsequently, on October 31, 1978, petitioner notified the PBGC that it had not made any contributions to the plan for its fiscal years ended October 31, 1977, and October 31, 1978, and that the assets of the plan were insufficient to pay benefits for more than a few months. As a result, on December 18, 1978, the PBGC filed a complaint in the United States District Court for the Western District of Pennsylvania pursuant to Section 4042(c) of ERISA (29 U.S.C. 1342(c)), seeking a decree adjudicating that the plan

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[1]This action was brought pursuant to Section 502(a)(1)(B) of ERISA (29 U.S.C. 1132(a)(1)(B)), which authorizes a participant or beneficiary to bring a civil action to recover benefits due him under the terms of a pension plan subject to ERISA. The jurisdiction of the federal district court was invoked under Section 502(e)(1) of ERISA (29 U.S.C. 1132(e)(1)), which provides that state courts of competent jurisdiction and federal district courts shall have concurrent jurisdiction of actions brought under Section 502(a)(1)(B).

should be terminated as of the date the complaint was filed (Pet. App. 3a, 14a).[2]

On May 31, 1979, petitioner ceased all operations and discharged more than 330 hourly workers, including 115 participants in the pension plan involved in this litigation who became eligible to retire by reason of termination of their employment with petitioner (*ibid.*). At a hearing held by the district court on June 27, 1979, in the plan termination suit filed by the PBGC, the evidence showed that petitioner's plan had assets of only $155,000, and had vested benefits guaranteed by the PBGC amounting to between $12 and $15 million (*Pension Benefit Guaranty Corp.* v. *Heppenstall Co.*, 633 F. 2d 293, 299-300 (3d Cir. 1980)). In addition, the plan had unfunded liabilities which reflected the cost of pensions payable under petitioner's collective bargaining agreement in excess of the statutory limitation on the benefits guaranteed by the PBGC (633 F. 2d at 300). See Section 4022 of ERISA, 29 U.S.C. 1322. See also 29 C.F.R. 2605 and 2609.[3] The present action was brought to recover directly from petitioner, as the sponsoring employer, the difference between the pensions provided in petitioner's

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[2]See *Pension Benefit Guaranty Corp.* v. *Heppenstall Co.*, 633 F. 2d 293, 297-298 (3d 1980). In that case, the court held that the district court had the authority to order the plan terminated at the request of the PBGC where the evidence showed that the plan was underfunded and was continuing to accrue unfunded benefit liabilities which would eventually increase the amount to be paid out of the trust fund administered by the PBGC unless termination was ordered. The case was remanded to the district court for further proceedings to establish an appropriate termination date (*ibid.*). Some of the facts relevant to the resolution of the present case were set out by the court of appeals in its opinion in *Pension Benefit Guaranty Corp.* v. *Heppenstall Co.*, *supra*, and incorporated by reference in its opinion in this case (Pet. App. 3a). We have relied in part on these two opinions by the court of appeals to establish the facts of the case.

[3]These provisions were recodified as 29 C.F.R. 2613 and 2621, respectively, effective June 29, 1981. 46 Fed. Reg. 32575 (1981).

pension agreement with the United Steelworkers and the amounts guaranteed by the PBGC (Pet. App. 2a-3a).

The district court held that petitioner was directly liable to the employees for their pensions under general contract law (Pet. App. 16a-17a). The court concluded that nothing in ERISA or in the language of petitioner's pension plan, as modified to meet the requirements of ERISA, exonerated petitioner from such liability (Pet. App. 15a-17a). Furthermore, the court held that this claim was not an arbitrable dispute within the scope of the compulsory arbitration clause of the pension agreement between petitioner and the United Steelworkers, because the employees had already retired, and each of them had previously established both his right to receive a pension and the amount due. Under the compulsory arbitration clause, only controversies concerning pension eligibility and the amount payable to a participant under the pension plan were within the scope of arbitration (Pet. App. 17a).

The court of appeals affirmed. It held that ERISA did not preclude direct employer liability for pension payments in excess of the amounts guaranteed by the PBGC (Pet. App. 3a). The court rejected petitioner's claim that Congress intended to limit an employer's total liability for pension benefits to the 30% of net worth amount recoverable by the PBGC under Section 4062(b) of ERISA (29 U.S.C. 1362(b)). In so ruling, the court pointed out that nothing in the legislative history of ERISA showed that Congress intended to prohibit an employer from undertaking an affirmative obligation to its employees to pay all vested pension benefits (Pet. App. 9a-13a). Here, the court concluded that in its contract with the United Steelworkers, petitioner affirmatively promised to pay pensions to its employees, and reserved the right to determine the manner in which it would fund those pensions. Hence, petitioner could not evade the obligation once the PBGC had acted to provide

the minimum pension guarantees provided under Title IV of ERISA, Sections 4001-4082, 29 U.S.C. 1301-1381 (Pet. App. 9a-13a).

Finally, the court of appeals affirmed the district court's holding that this dispute over the employer's liability for pension payments was not within the scope of the compulsory arbitration clause of the pension agreement because the retirees were not seeking to establish their rights to a pension under the agreement, or to establish the amount of any such pension (Pet. App. 6a).

ARGUMENT

1. The decision below correctly held that petitioner had affirmatively obligated itself to pay fully vested pension benefits to its employees even though the required additional payments exceeded petitioner's statutory obligation under ERISA to the Pension Benefit Guaranty Corporation.

In seeking review by this Court, petitioner contends (Pet. 5-6) that the decision below interprets ERISA in a manner that will impose large unforeseen liabilities on employers sponsoring qualified pension plans. But the court of appeals cast its decision in narrow terms. The court carefully pointed out (Pet. App. 12a-13a) that ERISA, as construed by this Court in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 378-380 (1980), permits an employer to limit its overall pension liability to its statutory liability to the PBGC of 30% of its net worth by agreeing to fund a pension trust and disclaiming any direct liability to its employees.[4] On the other hand, nothing in ERISA

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[4]Under the plan termination insurance provisions of ERISA, as contained in Section 4001 *et seq.* of the Act (29 U.S.C. 1301 *et seq.*), each participant's vested benefit is guaranteed by the PBGC up to a statutory limit prescribed by Section 4022 of the Act (29 U.S.C. 1322) if a plan is terminated voluntarily or involuntarily while the insurance coverage applies to it. Subject to certain exceptions, none of which is applicable here, the insurance coverage applies to all defined benefit

restricts an employer from further promising to provide pension benefits in an amount greater than the amounts guaranteed through the operations of Title IV of ERISA. Thus, the liability imposed upon petitioner by the decision below will come into play only in cases where, as here, the employer promises to pay pension benefits of a particular amount and does not disclaim direct liability to its employees. And even in those cases, the liability is not an unforeseen consequence of a judicial interpretation. To the contrary, it arises out of a contractual obligation assumed by the employer in the course of its business.[5]

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plans meeting the requirements of the Internal Revenue Code for treatment as qualified plans. Section 4021 of ERISA (29 U.S.C. 1321). If a covered plan is terminated, and the net assets of the plan are insufficient to pay all guaranteed benefits, the employer is liable to reimburse the PBGC for the unfunded benefits paid out under the guarantee, up to a limit of 30% of the employer's net worth. Section 4062 of ERISA (29 U.S.C. 1362).

[5]Here, petitioner presumably received a *quid pro quo* in exchange for its promise to pay fully vested pensions upon plan termination. The pension agreement between petitioner and the United Steelworkers of America provides that petitioner may establish a new trust or use an existing trust to fund the promised benefits (Pet. App. 5a). The agreement goes on to state (Pet. App. 5a):

> The Company is free to determine the manner and means of making provision for funding and paying the pension benefits set forth in this Agreement.

Because this agreement was negotiated in the course of collective bargaining, it is quite unlikely that petitioner could have persuaded the representatives of the United Steelworkers to accept such a clause unless it was willing to undertake direct liability for ultimate payment of the promised pension benefits. See, D. McGill, *Fundamentals of Private Pensions* 170-171 (4th ed. 1979). This is especially true because the benefits payable under this agreement exceeded the amounts guaranteed by the PBGC, leaving the employees at risk for the payment of the balance of their pensions if petitioner's pension plan were terminated when it had insufficient assets to meet all its liabilities. *Pension Benefit Guaranty Corp.* v. *Heppenstall Co.*, *supra*, 633 F. 2d at 300.

Although most employers included a disclaimer of direct liability in their pension plans prior to the enactment of ERISA, there were some employers which did guarantee the payment of at least some categories of pension benefits to their employees. D. McGill, *Employer Guarantee of Pension Benefits* 19-35 (1974). In July 1973, Professor McGill sent a questionnaire to 600 large corporations to survey their practices with respect to corporate guarantees of pension benefits. *Id.* at 19. Of the 225 usable responses received, the survey showed that 29 companies, or 13%, were directly obligated to pay some or all of their pension benefit liabilities. *Id.* at 19-23. The survey showed that there was a wide variation in the extent of such guarantees, some being limited to benefits payable to employees who had already retired, while others covered the accrued benefits of current and former employees to a greater or lesser extent. *Id.* at 23-24. Although the results of this study were not published until after ERISA had been enacted (*id.* at 8), there is nothing in ERISA that suggests that Congress intended to prohibit the use of such contractual guarantees, to the extent that employees could obtain them, to provide protection for their pension rights beyond the minimum guarantee which ERISA required through the mechanism of the mandatory plan termination insurance administered by the PBGC, and the associated employer liability contained in Section 4062 of ERISA (29 U.S.C. 1362). See pages 5-6, note 4, *supra*.

As this Court pointed out in *Nachman, supra*, 446 U.S. at 378, Congress was aware of the fact that most pension plans contained a disclaimer of direct employer liability for the payment of unfunded pension benefits. Because of those disclaimers, Congress recognized that some disincentive was necessary to prevent a rush of plan terminations which could undermine the proposed plan termination insurance system. Absent such a disincentive, employers might be

encouraged to terminate underfunded plans and thereby transfer their pension obligations to the PBGC. As Congressman Erlenborn[6] explained during the legislative deliberations that preceded the enactment of ERISA (120 Cong. Rec. 4285 (1974), reproduced in Senate Comm. on Labor and Public Welfare, *II Legislative History of the Employee Retirement Income Security Act of 1974*, 94th Cong., 2d Sess. 3388 (Comm. Print 1976)):

> The only way that one can make termination insurance something other than a dumping ground for the obligations of the employer is to put some sort of obligation on the employer. At the present time the legal foundation of pension plans is that the employer sets up a pension trust and promises to make periodic contributions into that trust. If there are sufficient assets, the employee will get the pension that has been described; if there are not, he does not get it; he gets something less. But the employer up until the present time generally has not made a promise to pay the pension, only to make periodic contributions.

Although Congress was understandably concerned about the possibility that employers would be reluctant to establish or maintain pension plans if it imposed an increase in direct liability on those employers who had previously disclaimed any liability except for the required contributions to a pension trust (see S. Rep. No. 93-383, 93d Cong., 1st Sess. 87 (1973)), there was no corresponding reason for Congress to limit direct employer liability for affirmative

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[6]Congressman Erlenborn was a member of the Committee on Education and Labor, 119 Cong. Rec. 2108 (1973), and took part in the work of the General Subcommittee on Labor, which held extensive hearings on the subject of private pension reform and drafted H.R. 2, 93d Cong., 1st Sess. (1973), one of the bills which was eventually incorporated into ERISA. See 120 Cong. Rec. 4272, 4274 (1974).

promises to pay pension benefits beyond those guaranteed by Title IV of ERISA. Indeed, the enforcement of such an undertaking is entirely consistent with the goals of ERISA. As this Court stated in *Nachman, supra,* 446 U.S. at 374--

> One of Congress' central purposes in enacting this complex legislation was to prevent the "great personal tragedy" suffered by employees whose vested benefits are not paid when pension plans are terminated. [Footnotes omitted.]

Here, petitioner's contractual liability arises out of collective bargaining. *Pension Benefit Guaranty Corp.* v. *Heppenstall Co., supra,* 633 F. 2d at 295; Pet. App. 71a-73a. The terms of the plan in question follow the pattern used by the United Steelworkers in their agreements with other major steel producers, one of which was litigated in *In re Alan Wood Steel Co.,* 4 Bankr. Ct. Dec. 850, 858-860 (E.D. Pa. 1978). There, as here, the court held that the employer was directly liable for the payment of the pensions promised under the agreement, and that nothing in ERISA barred the enforcement of such liability. Accord, *In re M&M Transportation Co.,* 3 Bankr. L. Rep. (CCH) 722 (S.D.N.Y. 1980). Thus, the court of appeals correctly concluded (Pet. App. 8a-11a) that petitioner was directly liable to its employees for the pension benefits that it promised to them, and that the employees could sue on petitioner's promise to recover any benefits in excess of those guaranteed by the PBGC when its pension plan was terminated.[7]

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[7]Petitioner argues (Pet. 11-12, 23-24) that the statutory right of an employee to bring an action to recover pension benefits (Section 502(a)(1)(B) of ERISA (29 U.S.C. 1132(a)(1)(B)) applies only to a suit against the pension plan. But the statute contains no such restriction, and the courts have correctly held that actions under this section can be maintained directly against an employer. *Landro* v. *Glendenning Motorways, Inc.,* 625 F. 2d 1344, 1351-1353 (8th Cir. 1980); *Pinto* v. *Zenith Radio Corp.,* 480 F. Supp. 361, 363 (N.D. Ill. 1979), aff'd, 618 F. 2d 110 (7th Cir. 1980); *Murphy* v. *Inexco Oil Co.,* 622 F. 2d 570, 573 (5th Cir. 1980).

2. Petitioner further argues (Pet. 20-22) that in holding that the arbitration clause of the collective bargaining agreement did not apply to this dispute over its liability for pension payments, the decision below conflicts with *Amato* v. *Bernard*, 618 F. 2d 559 (9th Cir. 1980), and *Challenger* v. *Local Union No. 1 of International Bridge, Structural & Ornamental Ironworkers*, 619 F. 2d 645 (7th Cir. 1980). Moreover, petitioner asserts that the decision of the court of appeals on this issue contravenes this Court's policy of requiring an aggrieved employee who is covered by a collective bargaining agreement to exhaust his remedies, if any, under the grievance and arbitration clause of the contract before resorting to the courts. *E.g.*, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 580-583 (1960); *Republic Steel* v. *Maddox*, 379 U.S. 650, 652-653 (1965).

But the policy in favor of arbitration does not exist in a vacuum; the parties must have agreed to submit a particular type of dispute to arbitration, and the issue of arbitrability is itself a justiciable one. *Steelworkers* v. *Warrior & Gulf Co.*, *supra*, at 582; *United States* v. *Moorman*, 338 U.S. 457, 462 (1950). Here, both the district court (Pet. App. 17a) and the court of appeals (Pet. App. 6a) held that the issue whether petitioner was liable for pension benefits claimed was not a dispute concerning an employee's right to a pension or the amount of his pension, and hence was not within the arbitration clause of the contract. Nothing in this conclusion violates the policy in favor of arbitration. Even on the assumption that doubts concerning arbitrability "should be resolved in favor of coverage," *Steelworkers* v. *Warrior & Gulf Co.*, *supra*, 363 U.S. at 583, the issue here is one of law in which the factors favoring arbitration have very little weight. In contrast to the issues held to be subject to arbitration in *Amato* v. *Bernard*, *supra* (calculation of pension credits), and *Challenger* v. *Local Union No. 1*, *supra* (loss of pension credits earned prior to a three-year

break in service), none of the employees in this case is involved in a dispute over the application of the petitioner's pension plan to the facts of his employment history. Therefore, the decision below does not conflict with the cases cited by petitioner. Similarly, the resolution of this dispute can have little effect on morale at the petitioner's plant or on the maintenance of industrial peace there because petitioner had sold its assets and terminated its pension plan. *Pension Benefits Guaranty Corp.* v. *Heppenstall, supra,* 633 F. 2d at 299. See *Steelworkers* v. *Warrior & Gulf Co., supra,* 363 U.S. at 581-582; *Republic Steel* v. *Maddox, supra,* 379 U.S. at 656-657.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S BRIEF IN RESPONSE TO BRIEF FOR UNITED STATES AS AMICUS CURIAE

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Statutes and Regulations:

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The Employee Retirement Income Security Act of September 1, 1974, Pub. L. 93-406 (88 Stat. 832) as amended (29 U. S. C. § 1001 *et seq.*):
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29 C. F. R. § 2560.503-1 7

Miscellaneous:

10 Wright and Miller, *Federal Practice and Procedure*, § 2730 4
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This Brief is submitted pursuant to Rule 22.6 of the Rules of the Supreme Court and is responsive to the brief filed on behalf of the United States as *amicus curiae.*

REASONS FOR GRANTING THE WRIT

The decision of the court below is contrary to Rule 56 of the Federal Rules of Civil Procedure as well as being contrary to this Court's decisions in *Nolde Brothers, Inc. v. Bakery Workers,* 430 U. S. 243 (1977) and in *Nachman Corporation v. Pension Benefit Guaranty Corp.,* 446 U. S. 359 (1980).

ARGUMENT

This Petition for a Writ of Certiorari seeks review of the decision of the United States Court of Appeals for the Third Circuit affirming the grant of partial summary judgment in favor of sixteen retired employees of Petitioner [1] on the liability aspect of a claim denominated: (1) by plaintiff-employees in their complaint as a suit in equity seeking injunctions mandating, first, payment of vested but unfunded pension benefits and, second, mandating contributions to the pension fund albeit the fund was terminated [2]; (2) by the *nisi prius* court as an action in the nature of *indebitatus assumpsit, i.e.,* an action at law rather than the suit at equity seeking injunctive relief which Plaintiffs had in fact commenced (17a); and (3) by the court below as a claim arising "under both the federal common law of labor-management contracts, and the federal common law of pension plans", 635 F. 2d at 237. The jurisdiction of the Court of Appeals was based upon a Section 1292(b) certified order. The court below reached beyond the certified question to "consider all grounds which might require a reversal of the order appealed

1. Respondents' motion to amend the complaint in order to seek class action certification and relief was withdrawn without prejudice in the lower court; the applicable statute of limitations has not expired.

2. A related case has determined, following two appeals by PBGC and the United Steelworkers of America to the Court of Appeals for the Third Circuit that the pension plan was properly terminated as of May 31, 1979. *PBGC v. Heppenstall Co.,* 633 F. 2d 293 (3d Cir. 1980); *Ibid.,* No. 81-1658 (3d Cir., filed Nov. 3, 1981).

from", 635 F. 2d at 235, n. 1[3], and affirmed the grant of summary judgment holding:

First, the contract language at issue, albeit not "syntactical" (and, therefore, requiring interpretation and exegesis) established Petitioner's "continuing direct liability for post-termination [and post-liquidation] pension payments", 635 F. 2d at 235-36; and

Second, this not "syntactical" contract language was enforceable against the employer in a suit under ERISA whereby "Congress authorized the evolution of a federal common law of pension plans", 635 F. 2d at 237, which federal common law, along with the federal common law of labor-management contracts, justified employer liability without recourse to the arbitration process, 635 F. 2d at 236.

In its *amicus curiae* brief, the United States argues that certiorari should be denied. In so arguing, the *amicus* brief assumes—without record support, or any other support—that there is a bargaining history which sustains the interpretation of the court below as to the unsyntactical language of the contract (brief, p. 6, n. 5). The *amicus* brief further makes a factual argument as to the meaning of the pertinent contract language in which argument there is not a single reference to the precise language in issue (brief, pp. 5-9) and which argument is devoid of reference to the record (in part, surely, because there is no record to support *amicus'* factual contentions).

Petitioner urges this Court to grant certiorari and reverse the court below because, succinctly put, (1) there is no bargaining history or other factual support for the construction of the contract language espoused by the court below, which construction reads the controlling subordinate clause out of the pertinent contract paragraph; (2) there is no bargaining history or other fact to support the suppositions contained in the summary judgment opinion of the court below[4] or the suppositions contained

3. Scope of appellate review pursuant to a § 1292(b) certification deserves direction by this Court; see the cases collected in 16 Wright and Miller, *Federal Practice and Procedure* § 3929, n. 33.

4. The *nisi prius* court wrote no opinion to explain its grant of summary judgment in the face of the contract language (19a-21a).

in the *amicus* brief; and (3) the creation by the court below of a federal common law of pension liability to pay unfunded retiree benefits in the face of concededly unclear contract language is contrary to the history of pension agreements in this country[5] and contrary to Congress' legislative judgment in enacting, after strenuous debate and compromise, § 4062 of ERISA, 29 U. S. C. § 1362.

In short, this case is "cert-worthy" for the reason that the courts below, in the absence of either contractual or jurisprudential justification, have ordered the post-liquidation assets of a company, which terminated its business—and, *coincidentally*, its pension and retirement plans —in the face of mounting losses arising out of declining productivity and foreign competition in the steel industry, to be transferred from the shareholders of that company (who have not received a dividend since 1970) to retirees who, under clear contract language, agreed that "[t]he Company is free to determine the manner and means of making provision for funding and paying the pension benefits set forth in this agreement" (75a) and who, under other contract language—read out of the contract by the court below—agreed that their pensions were vested and non-forfeitable solely "to the extent those benefits are funded by the applicable assets of the trust fund . . ." (76a)[6].

Contrary to Rule 56, the Lower Courts Granted Summary Judgment Where There Is an Issue of Fact as to the Meaning of Contract Language.

Rule 56 of the Federal Rules of Civil Procedure conditions the grant of summary judgment on proof by the movant that "there is no genuine issue of material fact". The meaning of contract language is an issue of fact, and is to be resolved by the fact finder, unless the contract language is so clear and unambiguous as to permit only

5. *Nachman Corporation v. Pension Benefit Guaranty Corp., et al.*, 446 U. S. 359, 368-370, 372-373 (1980).

6. This same contract language—abrogated by the court below—is apparently standard in all Steelworkers' contracts. See n. 5 at p. 3 of the Brief in Opposition hereto.

one meaning[7]. Hence, summary judgment is not to be entered pursuant to Rule 56 when the written agreement is ambiguous. 10 Wright and Miller, *Federal Practice and Procedure*, § 2730, cases collected at n. 7. See, *Associated Press v. United States*, 326 U. S. 1 (1945).

Here, key contractual language ("is effective to the extent those benefits are funded") has been said by the court below to have "no syntactical correspondent", 635 F. 2d at 235, was construed by the court below in the subjunctive[8], and was subjected to judicial exegesis without benefit of factual text for such exegesis, such as drafting or bargaining history[9]. The exegesis was then explained:

> "Read this way, Section 10.2 might at first seem to take away what it gives: participants' rights vest 'fully,' but if the employer fails to fund a pension trust, participants have fully vested rights in scant benefits. In fact, however, the employees have rights to benefits under the Collective Bargaining Pension Agreement, not merely under a pension trust. Section 8.1 establishes that the employer may set up a pension trust, and fund it as he wills, but the provision does not confine the employer's libality for pension benefits to a pension trust. Section 8.1, then, does not oblige the employer to fund any trust; the employer could [sic] be directly liable for all pension payments due under the Agreement. Read together, Sections 8.1 and 10.2 thus confirm the employer's continuing direct liability for post-termination pension payments." 635 F. 2d at 235-36.

But the language remains unchanged—"effective to the extent . . . funded". And, at the least, the language re-

7. *Castaneda v. Dura-Vent Corp.*, 648 F. 2d 612, 619 and cases there collected (9 Cir. 1981).

8. "Even were the verb plural, it would still fail to modify the right to receive benefits." 635 F. 2d at 235.

9. "We read the collection of clauses to mean: on the date the agreement terminates, participants' rights to benefits under the Agreement vest fully, to the extent the Company has funded the benefits, as provided in Section 8." 635 F. 2d at 235.

lated back to the freedom of the employer ". . . . to determine the manner and means of making provision for funding and paying the pension benefits . . ." 635 F. 2d at 235.

Petitioner contended before the courts below—and urges here—that the language of the agreement clearly limits liability.[10] At the least, the language of § 10.2 is ambiguous and requires interpretation in the context of § 8.1.[11] Accordingly, under established summary judgment principles, Petitioner is, at the very least, entitled to a reversal of the order of the court below and a remand for the taking of testimony to supply the drafting history and bargaining history which will permit an accurate factual understanding of the contract language and which will eschew the suppositions and assumptions upon which the courts below relied and which provide the basis for the *amicus* brief.[12] In short, is the contract before the Court one in which, on its face, the employer so clearly accepts direct liability for unfunded pension benefits as to justify the grant of summary judgment against the residual general assets of the liquidated employer (and, *ipso facto*, against the shareholders and equity owners of that employer)?

The Right to Pension, and Amount of Such Pension, Directly Payable by Petitioner Is an Arbitrable Issue.

Both under the pension agreement itself and under the collective bargaining agreement of which the pension agree-

10. Correctly read with the syntactical antecedent which the court below found to be missing, § 10.2 reads as follows: "In the event that this Agreement is terminated . . . the rights of any participant . . . shall . . . be fully vested and nonforfeitable . . . [and this Agreement] is effective to the extent those benefits are funded . . ."

11. In the court below, appellees consumed ten pages of their brief espousing a reading of the contract which required ignoring some contract language, explaining away other contract language and reading other contract language out of context.

12. Compare *Sartor v. Arkansas Natural Gas Corporation*, 321 U. S. 620 (1944). And, see *In the Matter of M & M Transportation Company*, 288 BNA Bankruptcy Reporter D-4 (S. D. N. Y. 1980) where the district court remanded to the bankruptcy judge for fact finding as to the presence *vel non* of an exculpatory clause in the pension plan which would decide pensioners' alleged claim against the bankrupt's estate.

ment is an integral part, dispute resolution rests, in the first instance at least, in the hands of an arbitrator or impartial umpire. § 7.1 of Petitioner's pension plan provides:

> "If any difference shall arise between the Company and any participant who shall be an applicant for a pension as to such participant's right to a pension or the amount of his pension and agreement cannot be reached between the Company and a representative of the International Union, such question shall be referred to an impartial umpire to be selected by the Company and the Union. . . . The decision of the impartial umpire on any such question shall be binding on the Company, the Union and the participant." [13]

If anything is clear in this dispute, it is that ". . . a difference [has arisen] between the company and [participants in the pension plan] as to such participant's right to a pension or the amount of his pension . . ." The court below read this arbitration clause out of the contract in a single paragraph which contained no reasoned explanation, 635 F. 2d at 236.[14]

As recently as *Nolde Brothers, Inc. v. Bakery Workers,* 430 U. S. 243 (1977), this Court has held, in the context of employee claims to severance pay and vacation pay geared—like these claimed pension benefits—to an employee's length of service and the amount of his earnings, that ". . . the parties' obligations under their arbitration clause survived contract termination when the dispute was over an obliga-

13. The text of the arbitration clause in the collective bargaining agreement is set forth at pages 72a-73a of the Appendix filed with this Court on May 8, 1981.

14. "The employer also relies on the pension Agreement's arbitration clause to maintain [sic] the employees may not bring their pension benefits claim in court. The arbitration clause, however, governs disputes concerning an employee-applicant's right to a pension, or the amount of a pension. This action does not address a dispute over these employees' rights under the pension agreement. The plaintiffs in this action are retired employees; their rights have already vested. This action instead concerns the enforceability of the Agreement's direct liability clause. If the clause is enforceable, the employees rights under it are clear." 635 F. 2d at 236.

tion arguably created by the expired agreement." 430 U. S. at 252. *See also, John Wiley & Sons v. Livingston,* 376 U. S. 543 (1964) and the cases collected in both *Nolde* and *Wiley.*

The same considerations of policy which led this Court, under the reasoned leadership of the Chief Justice, to conclude that the duty to arbitrate the *Nolde Brothers* contract claims survived termination of the collective bargaining agreement lead to the conclusion that the claims of these plan participants continue to be arbitrable under either the pension agreement arbitration clause or the collective agreement arbitration clause or both.

Indeed, the lower federal courts have begun to rule—consistently—that pension plan participants—including union member plan participants—are required to exhaust administrative remedies, including the arbitration process, before resorting to litigation in a federal court. *See, e.g. Amato v. Bernard,* 618 F. 2d 559 (9th Cir. 1980), and cases there collected. Further, ERISA itself requires qualified pension plans to provide administrative remedies for participants whose claims for benefits are denied either in whole or in part, 29 U. S. C. § 1133, and the Secretary of Labor, pursuant to Congressional authority, has prescribed detailed regulations governing such administrative remedies. See, 29 C. F. R. § 2560.503-1 *et seq.* As the Court of Appeals for the Ninth Circuit said, after reviewing the policy reasons which underlie Congress' decision to require easily available dispute resolution in qualified pension plans:

> "... It would certainly be anomalous if the same good reasons that presumably led Congress and the Secretary to require covered plans to provide administrative remedies for aggrieved claimants did not lead the courts to see that those remedies are regularly used. ..." 618 F. 2d at 567.

Just as this Court focused upon the law of the shop and the special competence of experienced arbitrators with consistent and repeated exposure to recurring labor-manage-

ment problems in fashioning the rules of arbitration for disputes arising under collective bargaining agreements in the *Steelworkers' Trilogy*, this Court—it is respectfully suggested—should direct the lower federal courts to resort to the law of the shop and the special competence of impartial arbitrators and umpires to comprehend and resolve recurring questions of pension entitlement under collective bargaining agreements and pension agreements which are based upon the "reticulated" ERISA statute and are, in themselves, "reticulated" and demanding of pragmatic and historical understanding.

The Lower Court's Denial of a Contractual Limitation of Liability Runs Counter to Historical Fact, Congressional Understanding and the *Nachman* Decision of This Court.

Writing for this Court in *Nachman Corporation v. Pension Benefit Guaranty Corp.*, 446 U. S. 359, 384-85 (1980), Justice Stevens observed:

> "But Congress plainly did not intend to prevent employers from limiting their potential direct liability to their employees. There is not a word in the statute or its legislative history suggesting that Congress ever intended to outlaw the use of such clauses.[35] On the contrary, the inclusion of a limit on an employer's contingent reimbursement liability to the PBGC measured by 30% of its net worth would be inexplicable if Congress had intended to deny employers any right to place a contractual limit on their direct liability to their employees . . .
>
> "35. Indeed, since their use had unquestionably contributed to the growth of private pension plans, their prohibition would be inconsistent with Congress' repeatedly expressed intent to encourage the maintenance of pension plans.
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> "... It bears emphasis that Congress declined to adopt the suggestion that corporate assets be committed to guarantee any pension obligations which exist at termination. The 30% provision was designed as a softer measure.

Earlier in that Opinion for this Court, Justice Stevens had noted:

> ". . . normal usage in the pension field was that even if the actual realization of expected benefits might depend on the sufficiency of plan assets, they were nonetheless considered vested." 446 U. S. at 378.

The court below, contrary to "normal usage in the pension field", contrary to Congress' understanding, and contrary to this Court's understanding as reflected in *Nachman,* found as a fact that the contract language in this case did not suffice to permit this employer to limit its direct liability for unfunded pension benefits to employees.[15]

In the face of the contract language, the court below found justification for its decision to impose direct liability on the employer in "a federal common law of pension plans" authorized by Congress when it enacted ERISA, 635 F. 2d at 237. Even assuming, *arguendo,* the authority to create such a common law, the common law as created by the court below is contrary to the understanding and expectations of the Congress, of this Court, of the learned commentators and of the parties to the instant agreements.[16] Indeed, had this Petitioner any notion that the language of the agreement could—or would—be so construed it surely would not have suggested that PBGC seek a voluntary termination of the plan and appointment of a trustee.[17]

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15. PBGC as insurer has, of course, paid benefits to plaintiffs pursuant to the statute; and Heppenstall has already paid PBGC a sum of excess of 50% of its post-liquidation assets.

16. In fact, if ERISA—rather than some penumbral federal common law of pensions—were to *require* the result here reached by the court below, the retroactivity defect under the Due Process clause rejected by the Court of Appeals for the Seventh Circuit in *Nachman* would perforce require a finding that the statute is unconstitutional. *Compare* 446 U. S. at 367, n. 12. *See also* Rev. Rul. 71-91 and published DOL Rulings whereunder contrary to the *Amicus* here, the IRS and Labor Department did hold a plan such as that discovered by the court below to be unqualified.

17. *PBGC v. Heppenstall Co.,* 633 F. 2d 293, 297-98 (3d Cir. 1980).

Indeed, given the power of PBGC to seek involuntary termination of a pension plan (29 U. S. C. § 1342), it is conceivable that, given financial facts such as those which compelled this Petitioner to liquidate its business, PBGC could determine to terminate a pension plan involuntarily and thereby ripen a power in pension plan claimants (such as plaintiffs here) to strip the company's assets from the equity owners. And, of course, if the employer had funds sufficient to pay 100% of the unfunded benefit to pension claimants, the Congressional limitation to 30% of net worth would be nullified.

The financial demise of any business is a disaster for all concerned and each group of affected persons suffers some loss: employees, loss of jobs, wages and perquisites; suppliers, loss of trade; creditors, loss of payment; shareholders, loss of investment. As between employee/retirees and shareholders, Congress struck a balance in ERISA: 30 percent of net worth to employees; 70 percent of net worth to equity holders. Absent pluperfectly plain contract language to the contrary, this choice, made by Congress after a decade of study of the Nation's private pension plans is—and must be—the law.

CONCLUSION

For the reasons set forth in Petitioner's original Petition, its Reply Brief and herein, Petitioner respectfully prays that this Court issue its Writ of Certiorari to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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